AUG 26 2016
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No. 15-649

IN THE

Supreme Court of the United States

CASIMIR CZYZEWSKI, *et al.*,
Petitioners,

v.

JEVIC HOLDING CORP., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 16, 2015
CERTIORARI GRANTED JUNE 28, 2016

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DOCKET ENTRIES
NO. 08-BK-11006 (BANKR. D. DEL.)*

Filing Date	#	Docket Text
05/10/2008	1	Chapter 11 Voluntary Petition. ... Filed by Jevic Holding Corp.
		* * *
05/20/2008	11	Motion to Approve Debtor In Possession Financing Filed By Jevic Holding Corp. ...
		* * *
05/21/2008	20	Adversary case 08-50662. Complaint (Class Action) by CASIMIR CZYZEWSKI and JEFFREY OEHLERS, on behalf of themselves and all other similarly situated against JEVIC TRANSPORTATION, INC., JEVIC HOLDING CORP., CREEK ROAD PROPERTIES, LLC, SUN CAPITAL PARTNERS, INC. ...
		* * *
05/22/2008	32	Order (INTERIM) (I) Authorizing Debtors-in-Possession to Obtain Senior Debtor-in-Possession Financing; (II) Granting Liens, Security Interests and Superpriority Status; (III) Authorizing Use of Cash Collateral; (IV) Affording Adequate Protection to Prepetition Lenders; and (V)

* Entries edited for brevity and clarity.

Filing Date	#	Docket Text
		Scheduling a Final Hearing. ...
		* * *
05/23/2008	37	Agreement *Notice of Filing of Debtor-in-Possession Credit, Guaranty and Security Agreement* ... Filed by Jevic Holding Corp. ...
		* * *
06/20/2008	118	FINAL ORDER (I) AUTHORIZING DEBTORS-IN-POSSESSION TO OBTAIN SENIOR DEBTOR-IN-POSSESSION FINANCING; (II) GRANTING LIENS, SECURITY INTERESTS AND SUPERPRIORITY STATUS; (III) AUTHORIZING USE OF CASH COLLATERAL; AND (IV) AFFORDING ADEQUATE PROTECTION TO PREPETITION LENDERS. ...
		* * *
08/20/2008	215	Order Approving Stipulation by and Between the Official Committee of Unsecured Creditors and The CIT Group/Business Credit, Inc. ...
		* * *
10/30/2008	304	Order Approving Stipulation by and Between the Official Committee of Unsecured Creditors and the CIT Group/Business Credit, Inc. ...
		* * *
02/27/2009	434	Order Approving Stipulation and Order Authorizing Official Commit-

Filing Date	#	Docket Text
		tee of Unsecured Creditors to Commence Litigation Against (1) Sun Capital IV LP and its Affiliates and (2) The Debtors' Present and Former Officers and Directors. ...
		* * *
06/27/2012	1346	Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief Filed by Jevic Holding Corp.
		* * *
07/13/2012	1371	Motion to Establish Administrative Claims Bar Date . Filed by Jevic Holding Corp.
		* * *
07/24/2012	1391	Response *to Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases*

Filing Date	#	Docket Text
		Upon Implementation of Settlement; and (III) Granting Related Relief Filed by Jevic Holding Corp. ... Filed by JC Graphic Solutions, LLC
07/25/2012	1389	Objection *to Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* ... Filed by United States Trustee ...
07/25/2012	1390	Objection *of Naysha Berrios, Individually and as Executrix, to Joint Motion of the Debtors et al to Approve Settlement and Dismiss Bankruptcy* ...
07/25/2012	1392	Objection *to Joint Motion* ... Filed by New York State Department Of Taxation And Finance ...
07/25/2012	1393	Objection to the Joint Motion of Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors ... Filed by Ohio Department of Taxation, Ohio Bureau of Worker's Compensation ...
07/25/2012	1394	Joinder of *Cabarrus County Tax Collector to the Objection of the*

Filing Date	#	Docket Text
		United States Trustee to the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. Sections 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (i) Approving Settlement Agreement and Releasing Claims; (ii) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (iii) Granting Related Relief ...
		* * *
07/25/2012	1396	Memorandum of Law in Opposition to the Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief ... Filed by CASIMIR CZYZEWSKI, MELVIN L. MYERS, JEFFREY OEHLERS, ARTHUR E. PERIGARD, and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated ...
07/26/2012	1397	Objection to Joint Motion of the Debtors, CIT, Sun Capital, and the

Filing Date	#	Docket Text
		Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief Filed by Jevic Holding Corp ... Filed by UNITED STATES OF AMERICA ...
		* * *
07/30/2012	1406	Order Setting Bar Date for Filing Administrative Claim Request Form. ...
		* * *
10/23/2012	1465	Supplement to the Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. Sections 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief ... Filed by Jevic Holding Corp. ...
		* * *
11/07/2012	1479	Objection In Opposition to the Supplement to (1) Joint Motion of Debt-

Filing Date	#	Docket Text
		ors, CIT, Sun Capital, and Official Committee of Unsecured Creditors for Entry of Order (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief; and (2) Debtors' Motion for Entry of Order (A) Authorizing Extension of Use of Cash Collateral, and (B) Granting Adequate Protection ... Filed by CASIMIR CZYZEWSKI, MELVIN L. MYERS, JEFFREY OEHLERS, ARTHUR E. PERIGARD, and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated ...
		* * *
11/09/2012	1482	Reply of Debtors to Objections to the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. Sections 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting related Relief ... Filed by Jevic Holding Corp.
11/09/2012	1483	Joint Response of the CIT

Filing Date	#	Docket Text
		Group/Business Credit, Inc., as Agent, and Sun Capital to Objections to, and Statement in Support of, the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors Cases Upon Implementation of Settlement; and (III) Granting Related Relief ... Filed by Sun Capital Partners, Inc., Sun Capital Partners Management IV, LLC, Sun Capital Partners IV, LP
11/09/2012	1484	Response *of the Official Committee of Unsecured Creditors to the Objections to Motion for Approval of Settlement Agreement and Dismissal of the Debtors' Chapter 11 Cases* ...
		* * *
11/27/2012	1514	Transcript regarding Hearing Held 11/13/2012 RE: 9019 Motion/Motion to Dismiss. ...
		* * *
12/04/2012	1519	Transcript regarding Hearing Held 11/28/2012 RE: Ruling on the motion to approve settlement. ...
12/04/2012	1520	Order Granting Joint Motion of the Debtors, CIT, Sun Capital and the

Filing Date	#	Docket Text
		Official Committee of Unsecured Creditors for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief. ...
		* * *
12/18/2012	1539	Notice of Appeal of Order Granting Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief. ... Filed by CASIMIR CZYZEWSKI, MELVIN L. MYERS, JEFFREY OEHLERS, ARTHUR E. PERIGARD, and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated. ...
		* * *
01/02/2013	1545	Motion for Stay Pending Appeal ... Filed by CASIMIR CZYZEWSKI, MELVIN L. MYERS, JEFFREY OEHLERS, ARTHUR E. PERIGARD, and DANIEL C. RICHARDS, on behalf of themselves and all others similarly situated. ...

Filing Date	#	Docket Text
		* * *
01/23/2013	1567	Order Denying Motion of Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated for a Stay Pending Appeal ...
		* * *
02/28/2013	1599	Transcript regarding Hearing Held 1/18/2013 RE: Motion to Stay Pending Appeal. ...
		* * *
10/11/2013	1741	Certification of Counsel *Regarding Satisfaction of Conditions In Order Approving Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. Section 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief ...* Filed by Jevic Holding Corp. ...
		* * *
09/09/2014	1757	Bankruptcy Case Closed

DOCKET ENTRIES
NO. 08-AP-51903 (BANKR. D. DEL.)*

Filing Date	#	Docket Text
12/31/2008	1	Adversary case 08-51903. Complaint *and Objection to CLaims* by Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp, et al. against CIT Group Business Credit, Inc. ...
		* * *
01/30/2009	5	Motion to Dismiss Adversary Proceeding—*The CIT Group/Business Credit, Inc.'s Motion to Dismiss the Complaint* ...
01/30/2009	6	Memorandum of Law *of The CIT Group/Business Credit, Inc. in Support of Its Motion to Dismiss Complaint and Objection to Claims* ...
		* * *
02/13/2009	9	Memorandum of Law *In Opposition to the Motion of CIT Group/Business Credit, Inc. to Dismiss Complaint and Objection to Claims* ... Filed by Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp, et al. ...
02/23/2009	10	Reply—*The CIT Group/Business Credit, Inc.'s Reply to Memorandum of the Official Committee of Unse-*

* Entries edited for brevity and clarity.

Filing Date	#	Docket Text
		cured Creditors of Jevic Holding Corp. in Opposition to the Motion of The CIT Group/Business Credit, Inc. to Dismiss Complaint and Objection to Claims ...
		* * *
06/30/2010	17	Amended Complaint to Add Party Filed by Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp, et al. ...
		* * *
09/27/2010	21	Answer to Complaint ... Filed by Sun Capital Partners IV, LP, Sun Capital Partners Management IV, LLC, Sun Capital Partners, Inc. ...
		* * *
05/13/2011	29	Memorandum of Law—*The CIT Group/Business Credit, Inc.'s Supplemental Memorandum in Support of Its Motion to Dismiss* ...
		* * *
05/27/2011	33	Reply *Plaintiff's Supplemental Memorandum In Opposition To Defendant's Motion To Dismiss* ... Filed by Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp, et al. ...
		* * *
06/03/2011	37	Reply—*The CIT Group/Business*

Filing Date	#	Docket Text
		Credit, Inc.'s Reply to Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss ...
		* * *
09/15/2011	40	Opinion Regarding Motion to Dismiss filed by CIT Group/Business Credit, Inc. ...
09/15/2011	41	Order Relating to Opinion Regarding Motion to Dismiss filed by CIT Group/Business Credit, Inc. ...
		* * *
10/07/2011	43	Second Amended Complaint ... Filed by Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp, et al. ...
11/04/2011	44	Answer to Amended Complaint Filed by Sun Capital Partners IV, LP, Sun Capital Partners Management IV, LLC, Sun Capital Partners, Inc. ...
11/04/2011	45	Answer to Amended Complaint, Counterclaim by The CIT Group/Business Credit, Inc. against Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp, et al.
		* * *
11/23/2011	47	Answer to Complaint with Counterclaim Filed by Official Committee of Unsecured Creditors on behalf of the

Filing Date	#	Docket Text
		bankruptcy estates of Jevic Holding Corp, et al. ...
		* * *
08/29/2013	88	Stipulation of Voluntary Dismissal of Adversary Proceeding with Prejudice Filed by The CIT Group/Business Credit, Inc., as Agent. ...
		* * *
01/28/2014		Adversary Case 08-51903-BLS Closed by Deputy Clerk.

DOCKET ENTRIES
NO. 13-CV-104 (D. DEL.)*

Date Filed	#	Docket Text
01/17/2013	1	Notice of APPEAL FROM BANKRUPTCY COURT appealing the Order entered on 12/04/2012 by Judge Shannon in Bankruptcy case number 08-51903. ... filed by Melvin L. Myers, Daniel C. Richards, Jeffrey Oehlers, Casimir Czyzewski, Arthur E. Perigard. ...
		* * *
03/08/2013	9	Appellant's BRIEF by Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Daniel C. Richards. ...
		* * *
04/08/2013	11	Appellee's BRIEF by CIT Group/Business Credit Inc., Creek Road Properties LLC, Jevic Holding Corp., Jevic Transportation Inc,, Official Committee of Unsecured Creditors, Sun Capital Partners IV LP, Sun Capital Partners Inc., Sun Partners Management IV LLC. ...
		* * *
04/22/2013	13	Appellant's REPLY BRIEF by Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard,

* Entries edited for brevity and clarity.

Date Filed	#	Docket Text
		Daniel C. Richards. ...
11/21/2013	14	MOTION to Dismiss Based upon Appeal is Equitably Moot—filed by CIT Group/Business Credit Inc., Creek Road Properties LLC, Jevic Holding Corp., Jevic Holding Corp., Jevic Transportation Inc., Official Committee of Unsecured Creditors, Sun Capital Partners IV LP, Sun Capital Partners Inc., Sun Partners Management IV LLC. ...
11/21/2013	15	Joint OPENING BRIEF in Support re 14 MOTION to Dismiss Based upon Appeal is Equitably Moot filed by CIT Group/Business Credit Inc., Creek Road Properties LLC, Jevic Holding Corp., Jevic Holding Corp., Jevic Transportation Inc., Official Committee of Unsecured Creditors, Sun Capital Partners IV LP, Sun Capital Partners Inc., Sun Partners Management IV LLC. ...
		* * *
12/12/2013	19	ANSWERING BRIEF in Opposition re 11 MOTION to Dismiss Based upon Appeal is Equitably Moot filed by Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Daniel C. Richards. ...
12/19/2013	20	REPLY BRIEF re 14 MOTION to Dismiss Based upon Appeal is Equitably Moot filed by CIT Group/Business

Date Filed	#	Docket Text
		Credit Inc., Creek Road Properties LLC, Jevic Holding Corp., Jevic Holding Corp., Jevic Transportation Inc., Official Committee of Unsecured Creditors, Sun Capital Partners IV LP, Sun Capital Partners Inc., Sun Partners Management IV LLC. ...
		* * *
01/24/2014	22	MEMORANDUM. Signed by Judge Sue L. Robinson on 1/24/2014.
01/24/2014	23	ORDER DISMISSING APPEAL AND AFFIRMING THE ORDER OF THE BANKRUPTCY COURT DATED NOVEMBER 28, 2012. (CASE CLOSED) Signed by Judge Sue L. Robinson on 1/24/2014. ...
02/21/2014	24	NOTICE OF APPEAL of 23 Order Dismissing Case, 22 Memorandum and Order. Appeal filed by Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Daniel C. Richards. ...
		* * *

DOCKET ENTRIES
NO. 14-1465 (3D CIR.)*

02/27/2014 CIVIL CASE DOCKETED. ...

* * *

07/08/2014 ELECTRONIC BRIEF with Volume I of Appendix attached on behalf of Appellants Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Esq. and Daniel C. Richards, filed. ...

* * *

09/26/2014 ELECTRONIC JOINT BRIEF on behalf of Appellees CIT Group Business Credit Inc, Creek Road Properties LLC, JEVIC Holding Corp, JEVIC Transportation Inc, Official Committee of Unsecured Creditors, Sun Capital Partners IV LP, Sun Capital Partners Inc and Sun Partners Management IV LLC, filed. ...

* * *

11/14/2014 ELECTRONIC REPLY BRIEF on behalf of Appellants Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Esq. and Daniel C. Richards, filed. ...

* * *

05/21/2015 PRECEDENTIAL OPINION Coram: HARDIMAN, SCIRICA and BARRY, Circuit Judges. Total Pages: 36. Judge: HARDIMAN Authoring, Judge: SCIRICA, Dissenting. We will affirm the order

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* Entries edited for brevity and clarity.

of the District Court.

05/21/2015 JUDGMENT, Affirmed. Costs taxed against Appellants.

* * *

07/06/2015 Petition filed by Appellants Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Esq. and Daniel C. Richards for Rehearing before original panel and the court en banc. ...

* * *

08/05/2015 Response filed by Appellees Sun Capital Partners IV LP, Sun Capital Partners Inc and Sun Partners Management IV LLC to Petition En Banc Rehearing, Petition for Panel Rehearing. ...

* * *

08/18/2015 ORDER (MCKEE Chief Judge, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, *SCIRICA and *BARRY, Circuit Judges) denying Petition En Banc Rehearing and Panel Rehearing filed by Appellants Melvin L. Myers, Casimir Czyzewski, Jeffrey Oehlers, Arthur E. Perigard, Esq. and Daniel C. Richards., filed. HARDIMAN, Authoring Judge. *Judge Scirica and Judge Barry's votes are limited to panel rehearing., filed.

08/26/2015 MANDATE ISSUED, filed.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 08-11006 (BLS)
Jointly Administered
Adv. No. 08-51903
Related to Adv. Docket Nos. 5, 6, 9, 10, 29, 33, and 37

IN RE JEVIC HOLDING CORPORATION, *et al.*,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ON BEHALF OF THE BANKRUPTCY ESTATES OF JEVIC HOLDING CORPORATION, *et al.*,
Plaintiff,

v.

THE CIT GROUP/BUSINESS CREDIT, INC., IN ITS CAPACITY AS AGENT, SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, AND SUN CAPITAL PARTNERS, INC.,
Defendants.

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* * *

OPINION[1]

Before the Court is a motion to dismiss (the "Motion") [Adv. Docket No. 5] filed by the CIT

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[1] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 ...." FED. R. BANKR. P. 7052(a)(3). Accordingly, the Court herein makes no findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Group/Business Credit, Inc. ("CIT"). By the Motion, CIT seeks the dismissal of all claims in the complaint and objection to claims, as amended (the "Complaint") [Adv. Docket No. 17] filed by the Official Committee of Unsecured Creditors (the "Committee") of Jevic Holding Corporation ("Jevic") that initiated this adversary proceeding. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012, CIT seeks to dismiss the Complaint with prejudice on the ground that the Committee has failed to state a claim upon which relief can be granted. For the following reasons, the Court will grant in part and deny in part the Motion.

I. BACKGROUND

On May 20, 2008 (the "Petition Date"), Jevic and various of its affiliates (collectively, the "Debtors") each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware. Founded in 1981, Jevic was a trucking company that provided regional and interregional transportation services across the United States and portions of Canada. In 2004, after years of profitability, Jevic began experiencing a prolonged financial downturn from which it never rebounded and which eventually led Jevic into bankruptcy.

Until 2006, Jevic was wholly owned by SCS Transportation, Inc. ("SCS"). Earlier that year, Jevic hired an investment banking firm to explore its financial and strategic alternatives. On June 30, 2006, Sun Capital Partners IV, LP ("Sun") purchased Jevic from SCS for

$77.4 million (the "Acquisition").[2] To finance the Acquisition, Sun obtained a $90 million loan (the "Acquisition Facility") from Bank of Montreal[3] to cover the purchase price and transaction costs. The Acquisition Facility was evidenced by a demand note, secured by all assets of Jevic and JHC, and guaranteed by Sun.

Within a month of the Acquisition, Jevic entered into a credit agreement administered by CIT to refinance the Acquisition Facility (the "Refinancing Facility"). Under the Refinancing Facility, Jevic obtained a revolving line of credit in the amount of $85 million (the "Revolver") and a $16.2 million term loan (the "Term Loan"), for a total credit facility in the amount of $101.2 million. The Refinancing Facility was secured by a first lien on all of Jevic's assets including its accounts receivable and stock, but the Term Loan was separately secured by two specific real estate properties owned by Jevic (the "Properties"). The proceeds of the Refinancing Facility were used to pay off the Acquisition Facility and to finance the transaction costs and fees.

Jevic was almost immediately in default of various provisions of the Refinancing Facility. In exchange for relaxing certain covenants, CIT obtained from Jevic various concessions and required Jevic to market the Properties and, upon their sale, to apply the sale proceeds of the Properties toward the outstanding princi-

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[2] For the sake of accuracy, the Court notes that Jevic was formally purchased by Jevic Holding Corporation ("JHC"), Sun's wholly owned investment vehicle, but for the purpose of ruling upon the Motion, the Court generally refers to Sun as the acquiring entity.

[3] The Court notes that the parties refer to Bank of Montreal by the name of its affiliate, Harris Bank.

pal of the Term Loan. Accordingly, within several months of the Acquisition, Jevic sold the Properties for approximately $20 million and delivered the proceeds to CIT. Jevic simultaneously entered into 20-year leases with the new owners of the Properties in order to continue to use the Properties for its ongoing business operations. The Committee refers to the sale of the Properties, the turnover of sale proceeds to CIT, and the execution of the leases in the aggregate as the "Sale-Leaseback." After the Sale-Leaseback, Jevic's obligations on the Refinancing Facility diminished: the Term Loan was paid in full and the Revolver was reduced to $55 million.

Notwithstanding these various transactions, Jevic's financial condition continued to deteriorate. Unable to meet its obligations under the Refinancing Facility, Jevic entered into a forbearance agreement with CIT, which was amended several times to extend the expiration date. The forbearance agreement finally expired without further extension on May 12, 2008. Eight days later, Jevic declared bankruptcy. Since the Petition Date, the Debtors have shut down their business operations and have liquidated their assets through a sale under 11 U.S.C. § 363.

As of the Petition Date, the Debtors' total liability on the Refinancing Facility was $50,417,204, and CIT has filed proofs of claim against the Debtors in this amount. Shortly after the Petition Date, the Court authorized the Debtors to obtain debtor-in-possession financing on a secured basis (the "DIP Financing Order") [Docket No. 118]. CIT is also the senior DIP financing agent. Under the terms of the DIP Financing Order, the Committee was granted standing to challenge the validity, enforceability, or priority of the Debtors' obli-

gations, including the liens on Jevic's assets securing the Refinancing Facility.

On December 31, 2008, the Committee timely objected to CIT's claims under the Refinancing Facility by filing a joint objection and complaint to initiate this adversary proceeding. CIT filed a motion to dismiss, and thereafter, the Committee filed the amended Complaint to add Sun and various of its affiliates (collectively, the "Sun Defendants") as defendants and allege various claims against the Sun Defendants based upon 11 U.S.C. §§ 510, 544, and 548 for their role in the same transactions already described in the Complaint.[4] With the Court's permission, the Committee and CIT have each filed supplemental memoranda citing additional authority in support of their respective positions on the Motion.

This matter has been fully briefed and argued, and it is ripe for decision.

II. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(a) and (b)(1). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. Consideration of this adversary proceeding constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), (C), (F), (H), and (O).

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to adversary

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[4] The Court notes that the Complaint, as amended, mirrors the original complaint mirrors in all relevant respects as it relates to CIT.

proceedings by Federal Rule of Bankruptcy Procedure 7012(b), is aimed to test the sufficiency of the factual allegations in the plaintiff's complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993) (citations omitted). The chief inquiry when ruling on a motion to dismiss is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The movant carries the burden of demonstrating that dismissal is appropriate. *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Anti-Trust Litig.)*, 496 F. Supp. 2d 404, 408 (D. Del. 2007).

In light of the U.S. Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Third Circuit Court of Appeals has instructed courts to conduct a two-part analysis when considering a motion to dismiss for failure to state a claim. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the Court should separate the factual elements from the legal elements of a claim. *Id.* The court must assume the veracity of the factual allegations set forth in the complaint, draw all reasonable inferences from the facts alleged, and construe all allegations in the light most favorable to the plaintiff. *Iqbal*, 129 S.Ct. at 1949-50; *Rea v. Federated Investors*, 627 F.3d 937, 940 (3d Cir. 2010) (citation omitted). The credibility of the facts alleged by the plaintiff are not at issue in a motion to dismiss because "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." *Twombly*, 550 U.S. at 556

(citations omitted).[5] However, the presumption of truth does not extend to any conclusory statements of law because the Supreme Court has held that "on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555.[6] The Court may therefore disregard any legal conclusions in the complaint. *Fowler*, 578 F.3d at 210-11.

Second, the Court must determine whether the factual allegations "are sufficient to show that the plaintiff 'has a plausible claim for relief.'" *Id.* at 211 (quoting *Iqbal*, 129 S.Ct. at 1950) (internal quotation marks omitted). But, the incorporation of only some factual allegations may not suffice at the pleading stage because the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.[7] Considering the merits of a motion to dismiss

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[5] *See also Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) ("[O]n a Rule 12(b)(6) motion, the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits.").

[6] *See also Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 333 (3d Cir. 2001) ("While facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions.") (citations omitted) (internal quotation marks omitted).

[7] The Supreme Court's plausibility standard does not require a plaintiff to demonstrate a likelihood of success at trial, but it does require showing "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (citation omitted). However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 1950 (quoting Rule 8(a)(2)).

is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (citation omitted). But, where a complaint fails to plead "enough fact to raise a reasonable expectation that discovery will reveal evidence [to support the claim]," the motion to dismiss must be granted as to such claim. *Twombly*, 550 U.S. at 556. Therefore, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 129 S. Ct. at 1950 (citation omitted).

Finally, to survive a motion to dismiss, a complaint must comport with the requisite pleading requirements set forth in the Federal Rules of Civil Procedure. Constructive fraudulent transfer claims are specifically governed by Federal Rule of Civil Procedure 8 rather than by the heightened Rule 9(b) pleading standard. *See, e.g., China Resource Prods. (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 788 F. Supp. 815, 819 (D. Del. 1992); *Charys Liquidating Trust v. McMahan Sec. Co. (In re Charys Holding Co.)*, 443 B.R. 628, 632 n.2 (Bankr. D. Del. 2010); *Astropower Liquidating Trust v. Xantrex Tech., Inc., (In re AstroPower Liquidating Trust)*, 335 B.R. 309, 333 (Bankr. D. Del. 2005). Federal Rule of Civil Procedure 8(a)(2), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7008(a), requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The Supreme Court has stated that the purpose of Rule 8 is "to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47

(1957) (internal quotation marks omitted).[8] The Supreme Court and the Third Circuit have both stated that "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 555 n.3; *Fowler*, 578 F.3d at 211 (citations omitted).[9] Thus "it is clear that conclusory or 'bare-bones' allegations will no longer survive a motion to dismiss." *Fowler*, 578 F.3d at 210.[10]

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[8] The Supreme Court explained that "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Twombly*, 550 U.S. at 555 n.3.

[9] The Third Circuit has observed that, in light of the Supreme Court's recent decisions in *Twombly* and *Iqbal*, "pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss." *Fowler*, 578 F.3d at 210. The Supreme Court noted that while "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1950.

[10] To survive a motion to dismiss, "[t]he plaintiff must put some 'meat on the bones' by presenting sufficient factual allegations to explain the basis for its claim." *Buckley v. Merrill Lynch & Co., Inc. (In re DVI, Inc.)*, Bankr. No. 03-12656, Adv. No. 08-50248, 2008 WL 4239120, at *4 (Bankr. D. Del. Sept. 16, 2008). "[L]egal conclusions can provide the framework of a complaint," *Iqbal*, 129 S.Ct. at 1950, but must be accompanied by facts because "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). The Third Circuit has also cautioned that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *See also Gen. Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 333 (3d Cir. 2001 (internal quotation marks omitted) (quoting 2 James Wm. Moore, Moore's Federal Practice § 12.34[1][b], at 12-61 to 12-63 (3d ed. 2001)).

IV. DISCUSSION

As it relates to CIT, the Complaint contains seven claims for relief grounded in the following causes of action: constructively fraudulent transfers under 11 U.S.C. §§ 544 and 548, preferential transfers under § 547, recovery under § 547, aiding and abetting breach of fiduciary duty, and equitable subordination under § 510. The Court addresses the sufficiency of the Committee's allegations with respect to each of these causes of action in turn.

A. Fraudulent Transfer Claims (Claims I through IV)

In Claims I and II, the Committee alleges that the Debtors' obligations on the Refinancing Facility, the liens on Jevic's assets which secure the Refinancing Facility, and the payments made on account of the Refinancing Facility, including the turnover of the proceeds from the sale of the Properties, are all constructively fraudulent transfers under 11 U.S.C. § 544(b) and the Uniform Fraudulent Transfer Act ("UFTA"). Complaint ¶¶ 137-52. In Claims III and IV, the Committee alleges that these same transfers and obligations are also voidable as fraudulent transfers under 11 U.S.C. § 548(a). Complaint ¶¶ 153-64. In support of its fraudulent transfer claims, the Committee argues that the Acquisition, the Acquisition Facility, the Refinancing Facility, and the Sale-Leaseback should all be viewed as component transactions that must be collapsed in a single integrated transaction, which in the aggregate comprise the leveraged buyout ("LBO") of Jevic by Sun. The Court first addresses the Committee's argument for collapsing these transactions and then considers whether the Committee has adequately

alleged fraudulent transfer claims against CIT under §§ 548 or 544, or both.

1. **Collapsing the Transactions**

The Third Circuit has recognized the propriety of collapsing multiple transactions and treating them as one integrated transaction for the purpose of assessing a defendant's fraudulent transfer liability. *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1301-03 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987). *See also Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 212-13 (3d Cir. 1990); *In re Old CarCo LLC*, 435 B.R. 169 (Bankr. S.D.N.Y. 2010) (quoting *In re Sunbeam Corp.*, 284 B.R. 355, 370 (Bankr. S.D.N.Y. 2002) ("The collapsing concept is usually applied when a series of transactions actually comprise a single integrated transaction, notwithstanding the fact that the 'formal structure erected and labels attached' make them appear distinct."). In *Tabor*, the Third Circuit explained that where a series of transactions were all "part of one integrated transaction," a court could look "beyond the exchange of funds" in one transaction and consider the "*aggregate* transaction." *Tabor*, 803 at 1300, 1302 (emphasis in original). An LBO is the classic context in which courts have collapsed multiple transactions for the purpose of assessing and finding fraudulent transfer liability. *See id.* at 1302; *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995) ("This [collapsing] approach finds its most frequent application to lenders who have financed leveraged buyouts of companies that subsequently become insolvent."); *Mervyn's LLC v. Lubert-Adler Group IV, LLC (In re Mervyn's Holdings, LLC)*, 426 B.R. 488, 498 (Bankr. D. Del. 2010).

To determine whether a series of transactions should be "collapsed" and viewed as a single integrated transaction, courts focus on the substance rather than on the form of the transactions and consider the overall intent and impact of the transactions. *See, e.g., Liquidation Trust v. Preferred Bank (In re Syntax-Brillian Corp.)*, Bankr. No. 08-11407, Adv. No. 10-51389, 2011 WL 3101809, at *11 (Bankr. D. Del. July 25, 2011) ("Instead of focusing on one of several transactions, a court should consider the overall financial consequences these transactions have on the creditors.") (citations omitted). While the transactions that are sought to be collapsed may be structurally independent and distinct from one another, courts focus their analysis "not on the structure of the transaction but the knowledge and intent of the parties involved in the transaction." *Official Committee of Unsecured Creditors of Hechinger Inv. Co. of Del. v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del.)*, 274 B.R. 71, 91 (D. Del. 2002) (internal quotation marks omitted) (citations omitted). *See also Orr v. Kinderhill Corp.*, 991 F.2d 31, 35-36 (2d Cir. 1993); *Liquidation Trust of Hechinger Inv. Co. of Del. v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del.)*, 327 B.R. 537, 546 (D. Del. 2005); *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Serv. Co.*, 910 F. Supp. 913, 934 (S.D.N.Y.1995); *Rosener v. Majestic Management, Inc. (In re OODC, LLC)*, 321 B.R. 128, 138 (Bankr. D. Del. 2005).

The courts in this District have considered the following factors when assessing whether the parties to the transactions sought to be collapsed had the requisite knowledge and intent to warrant consideration of the asserted transactions in the aggregate: whether all parties involved in the individual transactions had

knowledge of the other transactions; whether each transaction sought to be collapsed would have occurred on its own; and whether each transaction was dependent or conditioned on the other transactions. *See, e.g., Preferred Bank*, 2011 WL 3101809, at *12; *Mervyn's*, 426 B.R. at 497.

Whether the relevant parties to the various transactions had notice of the overall scheme has been a central issue for courts that have applied the collapsing theory. *See, e.g., Tabor*, 803 F.2d at 1302-03 (finding that the party in the first transaction had knowledge of the financial consequences of subsequent transactions); *Liquidation Trust of Hechinger Inv. Co.*, 327 B.R. at 546-47 (finding that defendants had knowledge of the consequences of subsequent transactions); *Mervyn's*, 426 B.R. at 497-98 (finding sufficient facts to show that defendant had knowledge of each transaction). "[C]ourts have looked frequently to the knowledge of the defendants of the structure of the entire transaction and to whether its components were part of a single scheme." *HBE Leasing*, 48 F.3d at 635-36.

Whether the parties had the requisite intent can be ascertained by demonstrating that the transactions sought to be collapsed are interdependent because "[e]ach step of the [collapsed] [t]ransaction would not have occurred on its own, as each relied on additional steps to fulfill the parties' intent." *Liquidation Trust of Hechinger Inv. Co.*, 327 B.R. at 547. The passage of some time between the various transactions sought to be collapsed is not fatal if they are sufficiently related. *Boyer v. Crown Stock Distribution, Inc. (In re Boyer)*, 587 F.3d 787, 795-96 (7th Cir. 2009). For example, in *Boyer*, the Seventh Circuit collapsed transactions that were about three years apart, finding that they were all "an integral part of the LBO." *Id. See also Orr*, 991

F.2d at 35; *Kipperman v. Onex Corp.*, 411 B.R. 805, 837 (N.D. Ga. 2009).

Ultimately, in the LBO context, courts will frequently collapse a series of transactions upon a showing that these transactions are part of "an overall scheme to defraud the estate and its creditors by depleting all the assets through the use of a leveraged buyout." *Rosener*, 321 B.R. at 138. Neither time nor transactional formalities can shield a party involved in such a series of transactions. With respect to lender liability specifically, the Third Circuit explained in *Tabor* that where a lender has been "intimately involved" with the overall transaction at issue, "[t]ry as they might to distance themselves from the transaction now, they cannot rewrite history." *Tabor*, 803 F.2d at 1303 n.8.

Here, the Committee seeks to collapse the Acquisition, the Acquisition Facility, the Refinancing Facility, the liens on Jevic's assets to secure the Refinancing Facility, and the Sale-Leaseback into one integrated transaction which, in the aggregate, should be viewed as Sun's leveraged buyout of Jevic (the "Jevic LBO"). In support of its argument, the Committee alleges that the overall intent of the transacting parties, *viz.*, Sun, Bank of Montreal, CIT, and Jevic—was to enable, facilitate, and effectuate the Jevic LBO. The Committee further asserts that CIT was aware of Sun's intentions to acquire Jevic from the start, even though the Acquisition Facility was initially provided by another bank. According to the Committee, Sun "turned to CIT to provide a 'comprehensive financing solution'" to facilitate its acquisition of Jevic. Complaint ¶ 39. The Complaint alleges that Sun and CIT negotiated for a June closing date months before the Acquisition occurred, but CIT was unable to close at that time. *Id.* ¶¶ 42-44. To avoid delaying the closing, the Committee alleges

that Sun obtained the Acquisition Facility from Bank of Montreal to serve as a "bridge facility" for the purpose of effectuating the Acquisition "until CIT was prepared to move forward with what would then be permanent financing." *Id.* ¶ 45. By the end of July, CIT had refinanced the Acquisition Facility through the Refinancing Facility. *Id.* ¶ 51. The Committee contends that "Sun would not have caused [its subsidiary] to borrow $90 million under [the Acquisition Facility], and Sun would not have guaranteed ... repayment of the [Acquisition Facility], if Sun was not all but certain that CIT would successfully complete the re-financing in a short period of time." *Id.* ¶ 50.

CIT argues that the Committee has failed to allege bad faith or an intent to defraud Jevic's creditors. However, the Court notes that the Complaint includes allegations of collusion between Sun and CIT to maximize the Refinancing Facility. The Committee argues that the Refinancing Facility, which exceeded the Acquisition Facility by more than $10 million, was the result of a collaborative and calculated effort by Sun and CIT to render unrealistically high asset valuations and revenue projections for Jevic with an eye towards obtaining the highest possible loan package. *Id.* ¶¶ 51-75. The Committee maintains that CIT would not have funded the Refinancing Facility—the Revolver and the Term Loan—without these allegedly excessive valuations and projections. *See, e.g., id.* ¶¶ 73, 76-77, 109.

The Court is satisfied that the Committee has sufficiently pleaded that there is cause to collapse the series of transactions which are allegedly comprised in the Jevic LBO. Based on the Committee's allegations, the Court could conclude that CIT, Sun, Bank of Montreal, and Jevic were all apprised of the overall goal—Sun's acquisition of Jevic through a highly leveraged buy-

out—of each of these separate transactions in which the various parties were involved. Assuming the veracity of the Committee's assertions and making all reasonable inferences in its favor, the Committee could establish that CIT had sufficient knowledge and notice of the Jevic LBO. The Court also finds that the Committee has adequately alleged that the various transactions constituting the Jevic LBO would not have occurred independently of each other. Given the short time span within which these transactions occurred and their asserted relatedness, the Court concludes that the Committee has provided enough facts from which the Court could reasonably infer the common aim of these transactions.

CIT attempts to shield itself from liability with respect to the Jevic LBO by maintaining that "[it] did not play any role in the leveraged buyout whatsoever." Motion at 7. While the Court acknowledges that the intervening role Bank of Montreal complicates the Committee's case and may ultimately prove fatal to the claims in the Complaint, the purpose of the integration doctrine is to enable a plaintiff to overcome precisely the type of argument against liability which CIT is now asserting. Despite CIT's detachment from the Acquisition Facility pursuant to which Sun initially acquired Jevic, the Court concludes that the Committee has sufficiently alleged that CIT was nonetheless "fully engaged," "actively pursuing the transaction," and intimately involved in the Jevic LBO. Accordingly, the Committee is entitled to develop and present evidence to corroborate its claims with respect to the propriety of collapsing the asserted transactions into Jevic LBO for the purpose of establishing CIT's fraudulent transfer liability.

2. Constructively Fraudulent Transfer Claims under § 548 (Claims III and IV)

Section § 548(a)(1) of the Bankruptcy Code grants a trustee the power to avoid any transfer made or obligation incurred by a debtor of an interest in property, made no more than two years before the debtor files for bankruptcy relief, if the transfer or obligation is deemed to be actually or constructively fraudulent. 11 U.S.C. § 548(a)(1). Here, the Committee has alleged that the Refinancing Facility, and its attendant liens and loan payments by Jevic, are voidable as constructively fraudulent transfers. A transfer or an obligation is deemed constructively fraudulent and thus voidable if the debtor received less than reasonably equivalent value in exchange for such transfer or obligation, and (i) the debtor was insolvent when such transfer was made or obligation was incurred, or became insolvent as a result thereof, (ii) the debtor retained unreasonably small capital to operate its business when the transfer was made or obligation was incurred, or (iii) the debtor made the transfer or incurred the obligation when it was already unable to service its debts. 11 U.S.C. § 548(a)(1)(B). Thus, to survive this Motion with respect to § 548(a)(1), the Complaint must include facts sufficient to show that Jevic did not receive reasonably equivalent value in exchange for the obligations it incurred and the attendant transfers it made. The Complaint must also include enough facts to show that Jevic was or became insolvent when these transactions occurred, or that it retained unreasonably small capital as a result thereof, or that it was unable to pay its debts when the transactions occurred.

a. Reasonably Equivalent Value

A transfer or obligation is avoidable under § 548(a)(1)(B) only if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(1)(B)(i). The term "reasonably equivalent value" is not defined in the Bankruptcy Code and "courts have rejected the application of any fixed mathematical formula to determine reasonable equivalence." *Peltz v. Hatten*, 279 B.R. 710, 736 (D. Del. 2002). The Third Circuit has held that assessing whether a debtor received reasonably equivalent value in exchange for a transfer or obligation requires a two-step approach. *Pension Transfer Corp. v. Beneficiaries under the Third Amend. to Fruehauf Trailer Corp. Ret. Plan No. 003 (In re Fruehauf Trailer Corp.)*, 444 F.3d 203, 212 (3d Cir. 2006). First, "a court must consider whether, 'based on the circumstances that existed at the time' of the transfer, it was 'legitimate and reasonable' to expect some value accruing to the debtor." *Id.* (quoting *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 144 (3d Cir. 1996).

Second, if the court finds that the debtor received any value, the court must engage in a fact-driven comparison between such value and the transfer or obligation sought to be avoided to determine "whether the debtor got roughly the value it gave." *Id.* at 212-13 (citations omitted). To assess the reasonable equivalence of the transfer or obligation and the value received by the debtor, a court should "look to the 'totality of the circumstances,' including (1) the 'fair market value' of the benefit received as a result of the transfer, (2) 'the existence of an arm's-length relationship between the debtor and the transferee,' and (3) the transferee's good faith." *Id.* at 213 (quoting *Mellon Bank*, 92 F.3d at 148-

49, 153). Courts have previously upheld the reasonable equivalence of indirect value as well. *See Fruehauf*, 444 F.3d at 212-13; *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 646 (3d Cir. 1996); *Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir. 1981).

In the LBO context, courts assess the value transferred to and from the debtor in the aggregate when the plaintiff in an avoidance action—typically the debtor the trustee—has established that the various transactions which compose the LBO should be collapsed and assessed collectively. *See, e.g.*, *Official Comm. of Unsecured Creditors of Nat'l Forge Co. v. Clark (In re Nat'l Forge Co.)*, 344 B.R. 340, 347 (W.D. Pa. 2006) ("It is now widely accepted that multilateral transactions may under appropriate circumstances be 'collapsed' and treated as phases of a single transaction for purposes of applying fraudulent conveyance principles.") (citations omitted). The debtor may be deemed to have received reasonably equivalent value in exchange for a transfer or obligation when one of a series of transactions is viewed in isolation and apart from the others. However, when the collapsed transactions are analyzed in the aggregate, courts have often found that the total value accruing to the debtor is not reasonably equivalent to the total value of the transfers made or obligations incurred by the debtor. *See, e.g.*, *Tabor*, 803 F.2d at 1302. For instance, the *Tabor* court found that certain funds which were alleged to have provided the debtor with reasonably equivalent value in fact merely passed through the debtor when the relevant transactions were integrated and viewed in the aggregate, prompting the court to find that the debtor did not receive reasonably equivalent value after all. *Id.*

Here, the Committee alleges that Jevic did not receive reasonably equivalent value in exchange for its

obligation with respect to the Refinancing Facility, the liens that secure it, and the various payments made on account thereof. Complaint ¶¶ 139, 148, 155, 161. CIT argues that in exchange for Jevic's obligation on the Refinancing Facility and the liens on Jevic's assets, CIT provided value to Jevic in the form of the loan proceeds. Motion at 10. CIT also asserts that in exchange for certain payments on account of the Refinancing Facility—specifically, to pay off the Term Loan using the proceeds from the sale of the Properties—CIT gave value via forbearance. *Id.* at 12. However, CIT's argument does not take into account the Committee's argument that when the transactions relating to the Jevic LBO are collapsed, the aggregate value of the obligation incurred and the transfers made by Jevic exceeds and is therefore not reasonably equivalent to the aggregate value that CIT provided to Jevic in return. The Committee alleges that the loan proceeds relating to the Refinancing Facility were used to pay off the Acquisition Facility, on which Sun's wholly owned affiliate was the obligor and Sun the guarantor. Considering all allegations and reasonable inferences in favor of the Committee, the Court concludes that the Complaint contains sufficient allegations that, if true, could support a finding that the loan proceeds received by Jevic merely passed through Jevic and thus failed to provide reasonably equivalent value to Jevic in exchange for the accumulated value Jevic transferred to CIT. While the Committee will still need to marshal evidence to refute CIT's charge that Jevic received reasonably equivalent value, the Court finds that the Committee has adequately alleged the absence of such value at this stage and is entitled to further pursue its claims.

b. Insolvency

The Bankruptcy Code defines insolvency as the "financial condition such that the sum of [an] entity's debts is greater than all of such entity's property." 11 U.S.C. § 101(32)(A). When determining liability under § 548, a court measures a debtor's solvency "at the time the debtor transferred value, not at some later or earlier time." *Mellon Bank*, 92 F.3d at 154 (citation omitted). Here, the Committee alleges that Jevic was "insolvent or would be rendered insolvent by the transactions undertaken in connection with the [Jevic] LBO, the [Refinancing Facility], and Sale-Lease Back." Complaint ¶¶ 140, 149, 156, 162. The Court concludes that these allegations are sufficient to survive this motion. *See Joseph v. Frank (In re Troll Commc'ns, LLC)*, 385 B.R. 110, 123-24 (Bankr. D. Del. 2008) (finding that insolvency was adequately pleaded where plaintiff alleged facts showing that debtors' liabilities exceeded their assets during the year before bankruptcy).

c. Unreasonably Small Capital

Like insolvency, the Bankruptcy Code does not define what constitutes unreasonably small capital. In the context of an LBO, the Third Circuit has held that "the test for unreasonably small capital is reasonable foreseeability." *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1073 (3d Cir. 1992). "The problem universal to all LBOs—transactions characterized by their high debt relative to equity interest—is that they are less able to weather temporary financial storms because debt demands are less flexible than equity interest." *Metro Commc'ns*, 945 F.2d at 647. When determining whether the LBO-related transactions sought to be collapsed and unwound left the target—now the debtor entity—with unreasonably small capital, the court

should determine whether the projections for the LBO target, which forecast that the debtor would retain sufficient cash or credit to operate and sustain its business, were reasonable. In other words, "[the court's] task in determining whether a company had sufficient working capital as evidenced by cash flow projections was not to examine what happened to the company but whether the projections employed prior to the LBO were prudent." *Id.* at 1072 (quoting *Credit Managers Ass'n v. Fed. Co.*, 629 F. Supp. 175, 187 (C.D. Cal. 1985)). Although the Moody court explained that "[i]f reasonable financial projections are made at the time of the LBO, defendants can make a strong argument that at least certain types of intervening events should be viewed as viable potential defenses," *id.* at 1071, the key is that any projections must in fact be reasonable. The Third Circuit explained that "[b]ecause projections tend to be optimistic, their reasonableness must be tested by an objective standard anchored in the company's actual performance." *Id.* at 1073. To satisfy the standard for reasonableness, "parties must also account for difficulties that are likely to arise, including interest rate fluctuations and general economic downturns, and otherwise incorporate some margin of error." *Id.* at 1073. As the Seventh Circuit stated in a recent decision, "businesses need adequate capital to have a good chance of surviving in the Darwinian jungle that we call the market" to weather business mistakes and other problems. *Boyer*, 587 F.3d at 795. An overly leveraged buyout that leaves the target company with unreasonably small capital—where it is reasonably foreseeable that the target will soon thereafter become insolvent—may provide the requisite factual predicate for an avoidance action grounded in fraudulent transfer law.

The Court finds it significant that the Third Circuit has stated that "leveraged buyouts present great potential for abuse." *Moody*, 971 F.2d at 1073. In a typical LBO, the target company alone—not the buyer—becomes obligated on the LBO debt that is secured by the target company's assets. The target company's capital structure is radically altered as a result of the LBO because its equity is substituted for highly leveraged debt for the benefit of the parties who are driving the LBO deal and to the detriment of the target company and its creditors. The risk of the LBO is thereby externalized to unsecured creditors and away from the parties to the LBO deal. For this reason, "[a]n LBO may be attractive to the buyer, seller, and lender because the structure of the transaction could allow all parties to the buyout to shift most of the risk of loss to other creditors of the corporation if the provisions of section 548(a)(2) were not applied." *Metro Commc'ns*, 945 F.2d at 646.

Here, the Committee alleges that the transactions related to the Jevic LBO left Jevic with unreasonably small capital. In support of this allegation, the Committee asserts that following the Jevic LBO, Jevic's equity was reduced from $46 million to $1 million while its debt rose from $55 million to $101.2 million. Complaint ¶ 80. The Committee further alleges that the projections underlying which the Refinancing Facility, allegedly prepared by Sun and approved by CIT, were unrealistic and highly unreasonable, but were made for the purpose of maximizing the Refinancing Facility. Assuming the truth of the Committee's allegations, the Court concludes that the Committee could establish that Jevic was left with unreasonably small capital within the meaning of § 548.

3. Fraudulent Transfer Claims under § 544 (Claims I and II)

Under § 544(b), a debtor may avoid any transfer of an interest in the debtor's property that is voidable under applicable state law by a creditor holding an allowable unsecured claim. 11 U.S.C. § 544(b)(1). Here, the Committee invokes the Uniform Fraudulent Transfer Act ("UFTA") but has failed to allege the state-specific UFTA law upon which such claim is grounded. As a general matter, UFTA allows a debtor's creditors to recover property that was transferred by a debtor who did not receive reasonably equivalent value for it and who was insolvent when the transfer occurred or became insolvent as a result thereof. Because UFTA generally tracks 11 U.S.C. § 548, the Committee's success on a § 544(b) action will likely mirror its success on a § 548 action that is based upon the same facts. Here, however, the Committee's failure to identify the state-specific UFTA upon which its claims are based leads the Court to conclude that the Committee has failed to put CIT on sufficient notice of the grounds upon which the cause of action against it are based. In light of *Twombly* and *Iqbal* especially, case law provides that such inadequate notice necessitates dismissal of the Committee's § 544 claim for failure to state a claim upon which relief can be granted. *Luster v. Greenhill Capital Partners II, L.L.P., (In re CLK Energy Partners, LLC)*, 2010 WL 1930065 at *4 (Bankr. W.D. La. May 12, 2010) (dismissing fraudulent transfer count with leave to amend for failure to identify nonbankruptcy law upon which the trustee's claim under § 544(b) was grounded). *See also Walker v. Sonafi Pasteur (In re Aphton Corp.)*, 423 B.R. 76 (Bankr. D. Del. 2010) (dismissing fraudulent transfer counts that recited only generally elements of UFTA and made "blan-

ket assertions" unsupported by specific facts about the allegedly voidable transfers). Accordingly, the Court will dismiss without prejudice and with leave to amend the Committee's claim under § 544(b).

B. Preferential Transfer Claims under § 547 (Claim V)

In Claim V, the Committee alleges that Jevic made certain transfers to CIT on account of the Refinancing Facility that are voidable as preferential transfers under 11 U.S.C. § 547. The Committee asserts that within 90 days of the Petition Date and while Jevic was insolvent, CIT received approximately $3.2 million from Jevic on account of its antecedent debt to CIT. Complaint ¶¶ 165-70.

Section 547 of the Bankruptcy Code provides that, subject to certain statutory exceptions, the trustee may avoid any transfer of an interest of the debtor in property (1) made to or for the benefit of a creditor, (2) for or on account of an antecedent debt owed by the debtor before such transfer was made, (3) made while the debtor was insolvent, (4) made on or within 90 days before the date of the bankruptcy petition is filed, and (5) which enabled the creditor to receive more than such creditor would have received under a hypothetical chapter 7 liquidation. 11 U.S.C. § 547(b). A preference action can only succeed if it seeks the avoidance of "a transfer that enables a creditor to receive payment of a greater percentage of his claim against the debtor than he would have received if the transfer had not been made and he had participated in the distribution of the assets of the bankruptcy estate." *Caliolo v. Saginaw Bay Plastics, Inc. (In re Cambridge Indus. Holdings, Inc.)*, No. 00-1919 (LK), C.A. 03-1009 (GMS), 2006 WL 516764, at *1-2 (D. Del. Mar. 2, 2006) (citing H.R. REP.

No. 95-595, at 177 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6138). This element of a preference claim is critical because "a creditor need not return a sum received from the debtor prior to bankruptcy if the creditor is no better off vis-à-vis the other creditors of the bankruptcy estate than he or she would have been had the creditor waited for liquidation and distribution of the assets of the estate." *Hager v. Gibson*, 109 F.3d 201, 210 (4th Cir. 1997) (quoting *Smith v. Creative Fin. Mgmt., Inc., (In re Virginia-Carolina Fin. Corp.)*, 954 F.2d 193, 199 (4th Cir. 1992)).

Here, the Committee lists in detail each of the allegedly preferential payments that Jevic made during the 90 days before the Petition Date. Specifically, the Committee asserts that between February 29, 2008 and May 20, 2009, Jevic transferred to CIT approximately $3.2 million on account of the Refinancing Facility. Complaint ¶¶ 165-69. CIT disputes that the Committee can establish all elements of § 547(b). Specifically, CIT argues that the Committee does not have a plausible preference claim against CIT on the ground that it will not be able to meet the requirement in § 547(b)(5) because CIT did not receive more from Jevic than it would have been entitled to receive under a hypothetical chapter 7 liquidation. CIT argues that its claims against the Debtors have always been (and still remain) fully secured because it holds liens on all of Jevic's assets to secure its obligations under the Refinancing Facility. Thus, CIT argues that any payments on account of the Refinancing Facility that CIT received from Jevic cannot be deemed preferential transfers because CIT received no more than it would have otherwise received and was therefore not actually "preferred" within the meaning of § 547.

However, CIT's argument does not take into account the potential effect of the Committee's claims against CIT to avoid the liens securing the Refinancing Facility. As the Committee correctly argues, CIT will remain secured only if and to the extent that the Committee does not prevail on its fraudulent transfer claims against CIT. For the reasons discussed above, the Court has found that at this stage, the Committee has adequately pleaded its fraudulent transfer claims against CIT. To the extent that the Committee will be able to substantiate its allegations and avoid CIT's liens on Jevic's assets, the Committee may be able to show that CIT is unsecured or undersecured with respect to the Refinancing Facility. Under these circumstances, the Committee may very well be able to establish that the allegedly preferential payments did indeed enable CIT to receive more than it would otherwise have been entitled to receive under the Bankruptcy Code's established priority scheme. Accordingly, the Court concludes that for the purpose of considering this Motion, the Committee has sufficiently alleged a cause of action against CIT under § 547. A contrary conclusion would be tantamount to finding that the Committee has no chance of succeeding on the merits of its avoidance claims under fraudulent transfer law, and this finding would necessarily contradict the Court's aforementioned conclusions regarding these claims in the preceding paragraphs.

C. Recovery of Avoided Transfers under § 550 (Claims I through V)

In Claims I through V, the Committee seeks recovery under 11 U.S.C. § 550 of the allegedly fraudulent and preferential transfers that are asserted in each of these claims. Section 550(a) of the Bankruptcy Code provides that, to the extent that a transfer is avoided

under, *inter alia*, §§ 544, 547, or 548, "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee or such initial transferee." 11 U.S.C. § 550(a).

For the reasons discussed above, the Committee has adequately alleged its avoidance actions under §§ 548 and 547. The Complaint contains sufficient facts from which the Court can infer that CIT was the initial transferee of the allegedly fraudulent and preferential transfers, which include the obligation Jevic incurred under the Refinancing Facility, the liens on Jevic's assets securing the Refinancing Facility, and the payments made by Jevic on account of these obligations. The Committee has sufficiently alleged § 550(a) claims for the recovery of voidable transfers, if and to the extent that such transfers are avoided under §§ 548 or 547, or both.

D. Aiding and Abetting Breach of Fiduciary Duty (Claim VI)

In Claim VI, the Committee alleges that CIT aided and abetted Jevic's officers and directors in the breach of their fiduciary duties. The Committee asserts that the officers and directors of Jevic breached their fiduciary duties by supporting and approving the Acquisition, the Refinancing Facility, the transfer of liens on Jevic's assets to CIT, the Sale-Leaseback, the transfer of the proceeds from the sale of the Properties to CIT, and the payments made by Jevic on account of the Refinancing Facility. The Committee also contends that CIT knew the officers and directors and knew that they breached their fiduciary duties by supporting and ap-

proving these transactions. The Committee maintains that notwithstanding this knowledge, "CIT directed, encouraged, assisted, facilitated and/or participated" in the conduct that has given rise to the directors' and officers' alleged breach of their fiduciary duties. According to the Committee, by aiding and abetting such conduct, CIT directly and proximately harmed Jevic by diminishing its estate, reducing its ability to operate its business, and increasing the likelihood that its creditors would not be paid in the event that Jevic declared bankruptcy. Complaint ¶¶ 171-77.

Under the internal affairs doctrine, only one state has the authority to regulate a corporation's internal affairs, which include matters peculiar to relationships among or between the corporation and its current officers, directors, and shareholders. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). The Supreme Court has held that the state under which the corporation is chartered has this authority. *Id.* Courts have long recognized that few, if any, claims are more central to a corporation's internal affairs than those relating to an alleged breach of a fiduciary duty by a corporation's directors and officers. *See, e.g., In re Topps Co. S'holders Litig.*, 924 A.2d 951, 960 (Del. Ch. 2007).

Here, because Jevic is a Delaware corporation, Delaware law governs the Committee's claim for aiding and abetting the breach of a fiduciary duty. As with a claim for the breach of a fiduciary duty, the internal affairs doctrine compels the Court to also apply Delaware law to a claim for aiding and abetting the breach of a fiduciary duty asserted against CIT. *See Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006) (noting that aiding and abetting claims are essentially civil conspiracy claims brought in the context of matters relating to the internal affairs of

corporations). *See also In re Am. Intern. Group, Inc.*, 965 A.2d 763, 822 (Del. Ch. 2009).

Delaware courts have articulated four elements that must be proven to establish a claim for aiding and abetting the breach of a fiduciary duty: (1) the existence of a fiduciary relationship; (2) the breach of a duty by the fiduciary; (3) the knowing participation in the breach by the defendant, who is not a fiduciary; and (4) damages to the plaintiff resulting from the concerted action of the fiduciary and the nonfiduciary. *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096 (Del. Ch. 2008). *See also Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001). Proof of scienter is the crux of a successful claim. *Allied Capital*, 910 A.2d at 1038. "In order to be found liable for aiding and abetting a breach of a fiduciary duty, one must demonstrate that the party knew that the other's conduct constituted a breach of a fiduciary duty and gave substantial assistance or encouragement to the other in committing that breach." *Bd. of Trs. of Teamsters v. Foodtown, Inc.*, 296 F.3d 164, 174 (3d Cir. 2002) (citing *Resolution Trust Corp. v. Spagnoli*, 811 F. Supp. 1005, 1014 (D.N.J. 1993)). *See also Malpiede*, 780 A.2d at 1097-98 (finding that "knowing participation" in a board's fiduciary breach requires that the third party act with knowledge that the alleged conduct alleged constitutes a breach). A plaintiff must demonstrate the defendant's "knowing participation" with specific facts. *Foodtown*, 296 F.3d at 174.

Here, the Committees fails to plead specific facts in support of its allegation that CIT knowingly participated in the breach of a fiduciary duty. The Complaint merely states in general terms that CIT knew the directors and officers of Jevic who breached their fiduciary duties, knew that their conduct amounted to such

breach, and directed, encouraged, and assisted such conduct. Complaint ¶¶ 172-76. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to support a claim under *Iqbal*. 129 S. Ct. at 1949. Additionally, the Committee fails to allege that it sustained damage that "resulted from the concerted action of the fiduciary and the nonfiduciary," as it is required to do under Delaware law. *Cargill*, 959 A.2d at 1125. Therefore, even when taking all factual allegations in the Complaint as true and drawing all reasonable inferences in favor of the Committee, the Court concludes that the Committee has failed to plead facts sufficient to establish a claim for aiding and abetting the breach of a fiduciary duty.

E. Equitable Subordination under § 510(c) (Claim VII)

Finally, in Claim VII, the Committee alleges that there is a sufficient factual predicate in support of its request for the equitable subordination under 11 U.S.C. § 510(c) of CIT's claims against the estate in the amount of approximately $50.4 million. The Committee asserts that CIT's conduct resulted in injury to the Debtors, conferred an unfair advantage to CIT, or both. Complaint ¶¶ 179-81.

The Bankruptcy Code provides that a court may "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim." 11 U.S.C. § 510(c)(1). Proof of three elements is required to establish equitable subordination: (1) the defendant engaged in some type of inequitable conduct; (2) the misconduct caused injury to the creditors or conferred an unfair advantage on the defendant; and (3) equitable

subordination of the claim is consistent with bankruptcy law. *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699-705 (5th Cir. 1977). *See also United States v. Noland*, 517 U.S. 535, 538-39 (1996) (adopting the *Mobile Steel* test for equitable subordination); *Schubert v. Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 411 (3d Cir. 2009). Courts differentiate between insiders and outsiders when analyzing whether conduct was inequitable. "The most important factor in determining if a claimant has engaged in inequitable conduct for the purposes of equitable subordination is whether the claimant was an insider or outsider in relation to the debtor at the time of the act." *In re Mid-Am. Waste Sys., Inc.*, 284 B.R. 53, 69 (Bankr. D. Del. 2002). If a defendant is not an insider, then evidence of more egregious conduct such as fraud, spoliation or overreaching is necessary." *Schubert*, 554 F.3d at 412 (internal quotation marks omitted).

Here, the Committee has alleged only that CIT's conduct, as it is described in the Committee's preceding claims, warrants the equitable subordination of CIT's claims against the Debtors. Complaint ¶¶ 180-81. Based on such sparse allegations, however, the Court cannot conclude that the Committee has sufficiently alleged a claim for equitable subordination against CIT and will therefore dismiss this claim.

V. CONCLUSION

The Court concludes that CIT has not established that dismissal is warranted with respect to the Committee's claims against it under 11 U.S.C. §§ 547, 548, and 550. However, the Court concludes that the Committee's remaining claims against CIT under §§ 544 and 510, and for aiding and abetting the breach of a fiduci-

ary duty will be dismissed without prejudice for failure to state claims upon which relief can be granted. For the foregoing reasons, the Court will grant in part and deny in part the Motion. An appropriate Order follows.

BY THE COURT:

Dated: Wilmington, Delaware
September 15, 2011

/s/ Brendan Linehan Shannon
Brendan Linehan Shannon
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 08-11006 (BLS)
(Jointly Administered)
Adv. Pro. No. 08-51903 (BLS)

October 7, 2011

IN RE JEVIC HOLDING CORPORATION, *et al.*,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ON BEHALF OF THE BANKRUPTCY ESTATES OF JEVIC HOLDING CORPORATION, *et al.*,
Plaintiff,

-against-

CIT GROUP/BUSINESS CREDIT, INC., IN ITS CAPACITY AS AGENT, SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, AND SUN CAPITAL PARTNERS, INC.,
Defendants.

SECOND AMENDED COMPLAINT AND OBJECTION TO CLAIMS

* * *

Plaintiff, the Official Committee of Unsecured Creditors of Jevic Holding Corp. (the "Committee") appointed in the above-captioned cases, on behalf of the estates of Debtors Jevic Holding Corp. ("JHC"), Jevic Transportation Inc. ("Jevic" or the "Company"), and Creek Road Properties LLC ("Creek Road") (JHC,

Jevic and Creek Road are collectively referred to as the "Debtors"), as and for its Second Amended Complaint and Objection to Claims against CIT Group/Business Credit, Inc., in its capacity as Agent, Sun Capital Partners IV, LP ("Sun Capital Partners IV"), Sun Capital Partners Management IV, LLC ("Sun Management"), and Sun Capital Partners, Inc. ("Sun Partners," and collectively with Sun Capital Partners IV, Sun Management and Sun Partners, "Sun"), by its undersigned counsel, alleges as follows:

PRELIMINARY STATEMENT

1. Like a borrower who put virtually no money down to acquire a house on the misguided belief that home values would only rise, Sun acquired Jevic with virtually none of its own money based on baseless projections of almost immediate growth and increasing profitability. The only differences were that Sun believed that it would never be responsible to repay the debt used to acquire Jevic, and Sun knew that Jevic's value had already declined considerably over a prolonged period of time.

2. With CIT's active assistance, Sun acquired Jevic on the backs of Jevic's creditors. Sun orchestrated a leveraged buyout (the "LBO") whereby Jevic's assets were leveraged to enable a Sun affiliate to pay a total adjusted purchase price of $77.4 million, consisting of $41.3 million in cash and $36.1 million of assumed liabilities, with no money down.

3. The acquisition costs were initially financed via a $90 million bridge loan. As planned, CIT, for itself and as agent for its syndication partners, re-financed those costs four weeks later in the form of $101.2 million of asset-based financing. Sun took virtually no risk on this gamble, contributing only $1 million in equity,

most of which it got back in "fees." Sun's transaction costs for the LBO were funded through loan proceeds derived from liens on Jevic's assets. Furthermore, CIT, who was purportedly fully secured, did not face any risk either.

4. Sun was able to secure the financing, in part, due to its preparation of unreasonably aggressive projections, projections that were enhanced after CIT expressed concern that Sun's initial projections "would not support" the syndication of the loan because they were too "conservative."

5. With the enhanced projections in hand, CIT lent as much as the asset values would support, and Sun leveraged every single asset to the maximum extent possible, such that Jevic ultimately secured from CIT $101.2 million in financing that drastically increased Jevic's borrowing costs and put its assets beyond the reach of its unsecured creditors. Part of the asset base used to secure CIT's financing was Jevic's valuable real estate.

6. Within seven months of its acquisition of Jevic, and consistent with its pre-acquisition plan, Sun caused Jevic to engage in the sale/lease back of certain of Jevic's real estate assets. Jevic received no benefit from the encumbrance of its real estate assets or from the sale-lease backs. The net proceeds of the sales went directly to CIT, as it required, to re-pay a portion of Sun's acquisition costs. Thus, after Jevic's real estate was encumbered to finance Sun's acquisition, and then sold to satisfy CIT, Jevic was left with onerous long-term obligations under 20-year leases and no real estate assets.

7. Sun's riskless acquisition, and CIT's riskless financing, was a disaster. Notwithstanding Sun's unrea-

sonably aggressive financial projections, Jevic was in default under its bank covenants almost immediately even though it drastically cut its capital expenditures to preserve liquidity. Jevic never met its budget in any fiscal quarter after Sun's acquisition and was forced to liquidate within two years of the LBO.

8. Based on its conduct, Sun is liable to the Debtors' estates under fraudulent conveyance laws in an amount equal to the value of the property transferred in connection with the LBO to fund Sun's purchase of Jevic. Further, each of its proofs of claim should be recharacterized as equity and/or equitably subordinated. Finally, the claims of Sun Management and Sun Partners should be disallowed and expunged or, in the alternative, recharacterized as equity or equitably subordinated.

9. CIT is also liable under fraudulent conveyance laws and its purportedly secured debt should be equitably subordinated to unsecured creditors.

JURISDICTION AND VENUE

10. The Court has jurisdiction over this action under 28 U.S.C. § 157(a) and 1334. This proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper in this District pursuant to 28 U.S.C. § 1408 and 1409.

PARTIES

11. The United States Trustee appointed the Committee on June 3, 2008. Pursuant to the Final Order (I) Authorizing Debtors-in-Possession to Obtain Senior Debtor in Possession Financing; (II) Granting Liens, Security Interests, and Superpriority Status; (III) Authorizing Use of Cash Collateral; and (IV) Affording Adequate Protection to Prepetition Lenders (the "Final DIP Financing Order") [Docket No. 118]

entered in the above-captioned bankruptcy cases on June 20, 2008, the Committee has standing, on behalf of the Debtors' estates, to commence and challenge, in accordance with the Federal Rules of Bankruptcy Procedure, the validity, enforceability, or priority of the Debtors' obligations under the Prepetition Senior Credit Agreement and to assert any claims or causes of action against the Prepetition Agent and the Prepetition Lenders.[1] Further, on February 27, 2009, the Court entered an Order approving the terms of a Stipulation between the Debtors and the Committee that, among other things, authorized the Committee to commence litigation against Sun and its affiliates.

12. Upon information and belief, Defendant CIT is a New York corporation that, for itself and as agent for other participating lenders, provided $101.2 million in available debt to Jevic.

13. Upon information and belief, CIT claimed to be owed approximately $51 million as of the petition date.

14. Upon information and belief, Defendant Sun Capital Partners IV is a Delaware limited partnership with offices located at 5200 Town Center Circle, Suite 600, Boca Raton, Florida 33486. Sun is the direct and/or indirect primary equity holder of the Debtors.

15. Upon information and belief, Defendant Sun Management is a Delaware limited liability company with offices located at 5200 Town Center Circle, Suite 600, Boca Raton, Florida 33486. Sun Management claims entitlement to unliquidated amounts purportedly due under a certain Management Services Agree-

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[1] Capitalized terms in this paragraph that are not otherwise defined herein shall have the meanings ascribed to them in the Final DIP Financing Order.

ment it allegedly entered into with Debtor Jevic Transportation, Inc.

16. Upon information and belief, Defendant Sun Partners is a corporation existing under the laws of the State of Delaware with offices located at 5200 Town Center Circle, Suite 600, Boca Raton, Florida 33486. Sun Partners asserts that it may have certain unliquidated "cross-claims or other claims against any of the Debtors."

17. Upon information and belief, Sun Capital Partners IV, Sun Management and Sun Partners are affiliated entities.

STATEMENT OF FACTS

18. Sun acquired Jevic through an LBO on June 30, 2006. Four weeks later, on July 28, 2006, Sun caused Jevic to re-finance its debt by leveraging all its assets to the maximum extent possible, with the financing provided by a consortium of banks led by CIT (the "Re-Financing"). In January 2007, Sun caused Jevic to enter into the sale/lease back of certain real property owned by Jevic (the "Sale-Lease Back").

19. The LBO, the Re-Financing and the Sale-Lease Back were all planned by Sun and CIT as part of the same integrated transaction. Whether viewed together or separately, Jevic could not support the LBO and the cost of the Re-Financing, and each of these transactions, including the Sale-Lease Back, harmed the Company.

A. Jevic's Business

20. Jevic was a trucking business that was founded in 1981. Jevic provided a broad line of less-than-truckload ("LTL") and truckload ("TL") services to its customers in the United States and portions of Canada.

21. Jevic purportedly developed integrated solutions for customers designed to lower their overall supply chain costs, which included direct-to-customer deliveries, multishipper order consolidation for their inbound supplies, and express and time-definite deliveries.

22. Upon information and belief, from approximately 2002 until June 30, 2006, Jevic was a wholly-owned operating subsidiary of SCS Transportation, Inc. ("SCS").

23. The period from 2000-2003 was an impressive one for Jevic. During that time, revenue and earnings before interest, taxes, depreciation and amortization ("EBITDA") grew at a healthy pace, with EBITDA ranging from $28.5 million to $38.3 million per year and EBITDA margins averaging 10.9%.

B. Jevic's Extended Pre-LBO Decline in Performance

24. However, for reasons more fully described below, beginning in 2004, and continuing without interruption for two and a half years until Sun's acquisition of Jevic on June 30, 2006, Jevic suffered a sustained and severe diminution of its business and earnings.

25. Jevic's persistent decline was well-reflected in its financial performance:

	2004	2005	TTM 2006	YTD 2005	YTD 2006[2]
Revenue (w/o FS)[3]	$316,722	309,779	301,719	105,238	97,178
Operating Income	8,887	3,126	(515)	87	(3,554)
Net Income	3,345	(506)	(2,674)	(752)	(2,920)
Unadjusted EBITDA	28,957	22,481	18,579	6,645	2,743
EBITDA Margin	9.1%	7.3%	6.2%	6.3%	2.8%

26. Jevic's steady decline during the thirty months prior to Sun's acquisition is even more dramatic when measured against Jevic's earlier performance. For example, while Jevic enjoyed double-digit EBITDA margins in each year from 2000-2003, Jevic's EBITDA margin eroded each year from 2004 through June 2006; and in the first six months of 2006, Jevic's EBITDA margin was just 2.8%.

27. Annual expenses during period 2000-2003 never exceeded $297 million, but annual expenses during the period 2004 through June 2006 were never less than $330 million, and hit a high of $344 million for the trailing twelve months ending May 2006.

28. Jevic's EBITDA eroded continuously from 2004 until Sun's acquisition in June 2006 such that Jev-

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[2] Whole numbers are reflected in thousands (000).

[3] "w/o FS" refers to "without fuel surcharge."

ic's EBITDA for the trailing twelve months ending in May 2006 was (a) less than 50% of Jevic's EBITDA in 2000, and (b) more than $10 million off the lowest amount of EBITDA reported by Jevic in any year from 2000-2003.

29. As reflected in Jevic's financial statements, Jevic did not suffer a bad quarter or even a bad year. Rather, for the two and a half years prior to Sun's acquisition (the "Declining Years"), Jevic suffered a steady and significant decline in performance and profitability. The causes for the Declining Years, as identified by Sun and CIT prior to the LBO, were several.

C. The Myriad Causes of Jevic's Decline That Led to Jevic's Sale

30. In 2000, following his sale of the Company, Jevic's founder started a competing trucking company just miles from Jevic, called New Century. New Century was staffed primarily with Jevic employees (Jevic lost approximately 300 employees, including drivers, operations personnel, sales staff and administrators to New Century), and as late as 2005, New Century hired a Jevic national account manager who had previously accounted for about $6 million of Jevic's annual revenue. New Century overlapped Jevic's entire eastern market and, with thorough knowledge of Jevic's account base, actively and aggressively solicited business from Jevic's customers.

31. More broadly, Jevic suffered during the Declining Years from a loss of customers resulting from increased competition. As Sun and CIT knew prior to Sun's acquisition, the trucking industry is highly competitive and fragmented. Jevic was competing with local, regional, inter-regional and national LTL carriers, and even with truckload carriers, air freight carriers

and railroads, some of which had greater financial resources, operated more revenue equipment and had larger freight capacity than Jevic. Competitors included Fedex, UPS, Yellow Corporation (another former owner of Jevic), Con-Way Transportation Services and other national and local players.

32. Against this competitive backdrop, Jevic was beset by numerous internal "performance" problems, including (what Sun believed to be) a wayward change in strategic direction; inefficient operations; substandard information systems; "expensive" employment arrangements with the driver work force; and declining volume.

33. Notably, prior to its acquisition of Jevic, Sun did a comparative analysis between Jevic and the trucking industry. Sun did not find any "statistically significant difference" between Jevic's declines (as measured by volume, tonnage and sales revenue) and the declines being felt throughout the trucking industry; thus, while Jevic suffered from various "performance" problems, Sun could not conclude that Jevic's challenges were qualitatively different from the broader trucking industry.

34. Apparently, one of SCS's largest shareholders saw the writing on the wall: with Jevic facing declining profits resulting from stiff competition, a softening trucking market, and its own operational difficulties, the shareholder demanded a sale of Jevic under the threat of a proxy fight.

35. Thus, in early 2006, Jevic retained Morgan Keegan, an investment banking firm, to explore strategic alternatives for the Company. As word reached the market-place, according to Sun and CIT, Jevic's down-

ward spiral continued as customers and employees lost confidence in the long-term viability of Jevic.

D. Sun Risks Nothing to Acquire Jevic

36. Sun is an investment firm focused on leveraged buyouts and other investments. With offices in the United States, London and China, Sun claims to have extensive experience and success with "turnaround" opportunities.

37. Sometime in early 2006, Sun was contacted by Morgan Keegan, Jevic's investment bank, to gauge Sun's interest in a possible acquisition of Jevic. Morgan Keegan provided Sun with a memorandum and other information concerning Jevic, including a description of the business and financial data.

38. Thereafter, Sun provided an "indication of value" and, after the passage of time, revised the proposal and proceeded to the due diligence stage.

39. Sun initially offered the opportunity to provide acquisition financing to Wells Fargo Foothill ("WFF"). WFF, however, was not interested in providing financing for any asset class other than accounts receivable. Since Sun intended to leverage all of Jevic's assets to complete its acquisition, Sun turned to CIT to provide a "comprehensive financing solution."

40. During June, Sun and CIT were fully engaged in the due diligence process. Sun engaged outside professionals including Crowe Chizek to review and analyze Jevic's historical cash flows, balance sheets and statements of operation; Marsh to review Jevic's insurance needs; and Mercer, an employee benefits company.

41. CIT retained Taylor and Martin to appraise Jevic's trucking assets; the Durkin Group to perform field examinations; and Cushman & Wakefield to ap-

praise Jevic's real estate assets. CIT also received projections of Jevic's future financial performance that were prepared by Sun.

42. As is more fully described below, Sun and CIT began this process in the late Spring of 2006 with an eye towards a June 30, 2006 closing.

43. Upon information and belief, SCS demanded the June 30 closing date and threatened to liquidate Jevic if Sun did not complete the acquisition by that time.

44. CIT, however, while actively pursuing the transaction, was not in a position to close by the June 30 deadline.

45. Consequently, Sun turned to its "warehouse facility," Harris Bank, an affiliate of the Bank of Montreal, to assist in securing a bridge loan (the "Bridge Loan") until CIT was prepared to move forward with what would then be permanent financing.

46. On June 30, 2006, the Bank of Montreal provided JHC, an investment vehicle wholly-owned by Sun, with a $90 million Bridge Loan that enabled JHC to complete the acquisition of Jevic.

47. The purchase price of the acquisition was $77.4 million, consisting of $41.3 million in cash and $36.1 million of assumed liabilities, inclusive of $2 million (the "Bridge Loan Fees") of direct transaction costs.

48. Thus, substantially all of the Bridge Loan was used for Sun's benefit to acquire Jevic. Most of the Bridge Loan was used to effectuate a change in ownership of the Company, a change that was of no benefit to Jevic.

49. The Bridge Loan was (i) evidenced by a demand note (*i.e.*, there was no term; the Bank of Mon-

treal could demand repayment at any time), (ii) guaranteed by Sun, and, (iii) upon information and belief, secured by all of the Debtors' assets.

50. Upon information and belief, Sun would not have caused JHC to borrow $90 million under the demand note, and Sun would not have guaranteed JHC's repayment of the $90 million demand obligation, if Sun was not all but certain that CIT would successfully complete the re-financing in a short period of time. Indeed, according to a Sun representative, Sun was "comfortable bridging the transaction given where CIT was in their diligence."

E. Sun's Overly Aggressive Projections and Revised Asset Appraisals Fuel the Increase of CIT's Re-Financing

51. From the time work on the acquisition and related financing began in the late Spring, through CIT's July 28, 2006 re-financing of the Bridge Loan, Sun and CIT devoted considerable attention to two data points: (a) Jevic's financial projections; and (b) the asset appraisals.

52. Since CIT's financing was to be asset-based lending, the asset values took on primary importance because they would determine the amount of money that CIT and its syndication partners were prepared to lend.

53. In general, and taking into account various reserves, CIT was prepared to lend as much money as the assets would support. Not coincidentally, Sun was prepared to leverage Jevic's assets to the greatest extent possible because the more CIT was prepared to lend, the less equity Sun would have to put at risk.

54. The projections were also important both because they were used to determine the benchmarks up-

on which certain financial covenants would ultimately be based and because they were supposed to provide a picture of the likelihood that Sun and CIT would reap a return on their respective investments and that Jevic would be able to repay the CIT financing in accordance with its terms.

55. Despite two and a half years of deteriorating financial performance in a highly competitive industry, from its initial drafts to its final version, Sun created ever more optimistic and aggressive iterations of its projections of Jevic's future financial performance, and CIT willingly embraced them. Upon information and belief, Sun's projections became unreasonably optimistic throughout the period prior to the re-financing because such optimistic projections were needed to secure CIT's financing and would enable Sun to reduce its equity commitment.

56. A review of the development of the projections over time shows that Sun unreasonably revised the projections upwards solely to support the acquisition and consequent refinancing, particularly when compared to Jevic's immediate prior performance.

57. In an early draft of the projections, Sun forecast that Jevic would experience (a) revenue growth of -3.0% in 2006; 0% in 2007; 1% in 2008; and 2% in 2009; and (b) EBITDA growth of -32.0% in 2006; 30.3% in 2007; 25.1% in 2008; and 23.4% in 2009.

58. These initial projections were wholly at odds with Jevic's recent historic performance. Jevic had experienced actual EBITDA growth rates of 10.3% in 2003; 6.4% in 2004; and -30.6% in 2005. In other words, even Sun's early projections forecasted EBITDA growth in 2007 and beyond at levels far in excess of any-

thing actually achieved by Jevic in any of the four years between 2003 and 2006.

59. Significantly, these early projections also forecast total bank borrowings of $91.7 million, and an equity contribution by Sun of $5 million. Sun's equity contribution under these projections was itself a reduction from the $10 million equity contribution CIT had earlier discussed with Sun.

60. By June, Sun had created new projections that drastically increased projected revenues, and adjusted other relevant metrics, all in a positive direction notwithstanding the Company's recent performance during the Declining Years.

61. Sun's "Base Case" projection in June (*i.e.*, the version of the projections which were thought most likely to be met) forecast (a) revenue (excluding fuel surcharge) growth of -5.0% in 2006; 3.0% in 2007; 4% in 2008; and 5% in 2009; and (b) EBITDA growth of -50.4% in 2006; 64.1% in 2007; 25% in 2008; and 21.2% in 2009.

62. Significantly, even with June's stepped-up forecasts (as compared to the earlier version), Sun's June "Base Case" still failed to project sufficient EBITDA to meet the EBITDA and Fixed Charge covenants ultimately incorporated into CIT's financing agreement.

63. And even under the June "Base Case" Jevic's "availability" (*i.e.*, the amount of unused borrowing power under a revolving line of credit) under its contemplated financing would have been depleted by approximately 20% in the last six months of 2006, and by almost 20% more by the end of 2007.

64. In June, Sun also prepared an "upside" set of projections that were unrealistically optimistic. Even though Jevic averaged less than 1% annual revenue

growth from 2001 through 2005, Sun's "upside case" in June provided for revenue growth (excluding fuel surcharge) of 5% in 2007; 6.1% in 2008; and 7% in 2009. All of the forecasted metrics that flow from revenue growth were also significantly improved.

65. Despite the unreasonably more optimistic projections (when compared to Jevic's actual performance and Sun's earlier projections), all was not well on the financing front.

66. While Sun and CIT were conducting due diligence and Sun was preparing and revising the projections, CIT was marketing the financing package to potential syndication partners.

67. In June, CIT prepared a Confidential Memorandum for potential investors. The memorandum described a total package of asset-based financing that included a $70 million senior secured revolving facility (the "Revolver"), secured by all non-real estate assets, and a separate $16.4 million real estate term loan. According to Sun, it was "ready, willing and able" to proceed with the acquisition of Jevic based on this loan package of $86.4 million.

68. Upon information and belief, CIT knew that Sun was prepared to close on a $86.4 million loan package for the acquisition and financing of Jevic, and implicitly knew that Sun deemed $86.4 million to be sufficient to fund the acquisition and Jevic's operations.

69. There were only two problems. First, some potential investors balked because, by this time, Sun's equity commitment had dwindled from $10 million (as discussed with CIT), to $5 million (as reflected in the early projections), to just $1 million.

70. Second, and more significantly, CIT concluded that the projections would not support the syndication effort.

71. Specifically, CIT believed that Sun "provided a model" that "did not support" CIT's "ability to syndicate the transaction" because "the turnaround was not early enough in the transaction based on where the capital structure was" and the EBITDA projections were insufficient.

72. Sun's representative who was responsible for completing the acquisition and obtaining the related financing recalls being told by someone that the projections were "too conservative," he just could not recall who told him that.

73. So instead of lowering the bridge, Sun tried to raise the water to close the gap. In July, Sun prepared revised projections that were used by CIT to syndicate the $101.2 million Re-Financing (the "Enhanced Projections"). The Enhanced Projections bore a striking resemblance to the June "upside" case and were similarly unrealistic. In fact, the Enhanced Projections now forecast that Jevic would substantially complete its "turnaround" within 18 months-as CIT indicated was required to complete the syndication-and perform at a level that would finally enable it to exceed the benchmarks reflected in the financial covenants ultimately contained in the Financing Agreement.

74. Meanwhile, CIT was receiving appraisals on Jevic's assets that exceeded expectations. CIT's "[u]nderwriting was focused on the asset values ... because that was the deal" for CIT.

75. Even though Sun was "ready, willing and able" to close on the acquisition with $86.4 million in financ-

ing, including a $70 million Revolver, the higher asset valuations enabled CIT to offer an even larger financing package of $101.2 million, including an $85 million Revolver, which Sun and Jevic readily accepted.

F. CIT and Jevic Close on a $101.2 Million Financing

76. On July 28, 2006, CIT, for itself and as agent for the lending group, and Jevic, as the borrower, closed on the financing pursuant to a written financing agreement (the "Financing Agreement"). CIT provided an $85 million Revolver (inclusive of $35 million in letters of credit), and a $16.2 million term loan for a total loan facility of $101.2 million, inclusive of the payment of $1.5 million of direct transaction costs (the "CIT Loan Fees"). Sun caused JHC to contribute $1 million in equity.

77. Upon information and belief, CIT would not have funded the Re-Financing on its own, and CIT would not have been able to syndicate the Re-Financing without the Enhanced Projections.

78. Upon information and belief, Jevic's officers and directors approved the Re-Financing in breach of their fiduciary duty. Jevic's officers and directors knew or should have known that the Re-Financing was based, in part, on specious projections and otherwise caused the Company to vastly increase its total debt and debt service obligations, and encumber all of its assets, all to the detriment of Jevic and its creditors.

79. Jevic incurred expenses of approximately $1.4 million in connection with the CIT-led Re-Financing, including closing fees to CIT in the amount of $101,200.00—on top of approximately $1.7 million in transaction expenses associated with the acquisition and Bridge Loan.

80. The change in Jevic's capital structure resulting from the Re-Financing was stark. Immediately prior to Sun's acquisition, Jevic had long-term debt of approximately $55 million and shareholders' equity of approximately $46 million. After Sun's acquisition and the Re-Financing, Jevic had debt (or the ability to utilize debt facilities) in an amount up to $101.2 million and equity of $1 million.

81. The only thing accomplished by this recapitalization was a change in ownership. Sun acquired ownership of Jevic, using Jevic's assets to pay the purchase price.

82. Thus, as of July 28, 2006, Sun—with CIT's backing—had (a) acquired a company that Sun knew had experienced a prolonged downturn in financial performance and which operated in a highly competitive market while beset by many operational problems; (b) leveraged Jevic to the hilt, converting approximately $45 million of shareholders' equity into debt bearing an interest rate of almost 9 percent; (c) leveraged every single asset owned by Jevic to the maximum extent possible in order to finance the acquisition; (d) caused the incurrence of over $3 million in direct transaction costs associated with the acquisition and Re-Financing; and (e) avoided virtually all risk by contributing just $1 million in new equity, most of which was repaid to Sun in the form of "fees."

83. Those "fees" were paid at the time of the Re-Financing and immediately prior to the bankruptcy filing. Specifically, in July 2006, Jevic paid Sun $640,001 in financing fees and $124,999.00 in management fees. Then, in April 2008, it paid Sun an additional $32,009.85 in management fees. The total amount of "fees" paid to

Sun as part of the LBO was $797,009.85 (the "Direct Sun Fees").

84. Tellingly, neither Sun nor CIT did any analysis to determine the impact of Jevic's newly-found debt burden compared to Jevic's pre-acquisition cost of borrowing.

85. For a company that had experienced a prolonged period of decline in terms of profitability, and which operated in a highly competitive market while enduring myriad operational problems, the impact of Jevic's newly-imposed debt burden was catastrophic, putting its constituents, including its unsecured creditors, contract counterparties and employees, at great risk.

86. Collapsed together, the cost of Sun's acquisition of Jevic, and the Refinancing, left Jevic with substantially increased borrowing costs and with unreasonably small capital; and Jevic was rendered insolvent.

87. As would soon be apparent, Jevic could not perform at the level forecast by Sun. And since the financial covenants were predicated on Sun's overly-optimistic projections, Jevic had no margin for error.

88. Specifically, Jevic agreed to several financial covenants in its Financing Agreement with CIT. The financial covenants were established by CIT at 80% of the relevant portions of the financial projections. Thus, if Jevic achieved just 80% of the relevant portions of the projections, it would be in compliance under the financial covenants. If Jevic could not achieve that seemingly modest goal, Jevic would be in default and considerable benefits and rights would inure to CIT's benefit and to Jevic's detriment.

89. One relevant portion of Sun's projections was the EBITDA forecast. CIT used 80% of the projected

EBITDA to establish minimum consolidated EBITDA benchmarks that Jevic had to meet each calendar quarter (the "EBITDA Covenant").

90. Another relevant portion of the projections was the fixed charge ratio. Again, CIT used 80% of the projected fixed charge ratio to establish a benchmark that Jevic was required to meet under certain circumstances (the "Fixed Charge Covenant").

91. Ironically, while Sun's unreasonably aggressive projections may have helped it secure the Re-Financing, and may have helped CIT syndicate that loan package, the same projections formed the basis of financial covenants that Jevic could not meet and would lead to its downfall and ultimate liquidation.

G. Jevic Is in Immediate Default and Financial Distress

92. Sun's projections notwithstanding, Jevic was not just on the road to ruin; it was on the fast track.

93. Within days of the acquisition, Jevic began slashing its capital expenditure budget in an effort to maintain liquidity.

94. The debt burden created by CIT's re-financing also had a material, adverse effect of Jevic's cash flow.

95. And sales and EBITDA continued to erode at a precipitous pace.

96. In the first three months of Sun's ownership, from July 1 through September 30, 2006, Jevic (a) missed its revenue target by more than 6%; (b) "achieved" EBITDA that was less than 25% of the EBITDA Sun had forecasted just weeks before (*i.e.*, Jevic missed Sun's EBITDA projection in the very first

quarter by more than 75%); and (c) cut capital expenditures by almost 50% from the budgeted amount.

97. The only "external" event cited for Jevic's dismal performance was Jevic's inability to immediately re-gain lost customers and sales revenue.

98. Incredibly, on September 11, 2006, just six weeks after the closing of CIT's Re-Financing, Jevic and Sun knew that Jevic would default under the EBITDA Covenant as of September 30, 2006.

99. On September 11, Jevic's Chief Financial Officer (the "CFO") reported to Sun that compliance with the EBITDA Covenant as of September 30, 2006 was "not feasible" and that the EBITDA Covenant would "continue to be a concern through calendar 2007..." The CFO ominously recommended that Jevic "start conversations with our lending group shortly to explore our options."

100. The CFO's September 11 observations proved prescient.

101. On October 11, 2006, Jevic informed CIT that it was in default under the EBITDA Covenant as of September 30, 2006, and CIT promptly declared a default under the Financing Agreement.

102. Jevic faced liquidity problems for the balance of the year, and, as of December 31, 2006, was in default under both the EBITDA Covenant and the Fixed Charge Covenant.

103. CIT, Jevic and Sun negotiated an amendment to the Financing Agreement that was executed on January 16, 2007 (the "Second Amendment"), less than six months after CIT provided the Re-Financing.

104. The parties recognized the dire circumstances confronting Jevic and acted to protect their own interests.

105. The unreasonableness of Sun's July 2006 projections—including its forecast (incorporated into CIT's syndication marketing materials) of 2007 EBITDA growth of more than 75%—became crystal clear. Implicitly recognizing that Jevic would not generate meaningful earnings for the foreseeable future, the Second Amendment eliminated the EBITDA Covenant in its entirety.

106. The Second Amendment also modified the formula for calculating the Fixed Charge Covenant, and lowered the Fixed Charge ratio by 90% for the January 1 through June 30, 2007 period, and by 55% for the period ending September 30, 2007 (the "Modified Fixed Charge Covenant"), all presumably to make it easier for Jevic to avoid further defaults.

107. In exchange for the elimination and substantial loosening of Jevic's financial covenants, CIT extracted significant concessions including (a) a $250,000 fee; (b) a requirement that Jevic provide weekly certified borrowing base certificates (as opposed to monthly); (c) a doubling of the frequency in which CIT could perform Rolling Stock and Real Estate Appraisals, at Jevic's expense; (d) a requirement that *all* net proceeds from the contemplated sale/lease back of real property (discussed below) be used to pay off the Term Loan, and then to pay down the Revolver; and (e) a condition precedent requiring Jevic to deliver to CIT executed leases with respect to the properties being sold.

H. The Sale-Leaseback Worsened Jevic's Plight

108. Jevic owned three pieces of real property (and related improvements) located in Delanco, New Jersey, Markham, Illinois, and Oxford, Massachusetts (together, "Jevic's Real Estate"), and maintained operations at each site.

109. In connection with its due diligence for the Re-Financing, CIT received new real estate appraisals and thereafter agreed to lend $16.2 million (or 70% of the stated market value of Jevic's Real Estate) in the form of a term loan (the "Term Loan") in exchange for security interests in Jevic's Real Estate.

110. Jevic received no benefit from the $16.2 million lent by CIT against Jevic's Real Estate; as Sun and CIT knew and intended, the proceeds from the Term Loan were used to repay the Bridge Loan, which was obtained to finance Sun's acquisition, not to fund Jevic's operations.

111. But borrowing against Jevic's Real Estate was just the first step in Sun's larger plan. Prior to its acquisition of Jevic, Sun mapped out a plan to leverage Jevic's Real Estate to help finance the acquisition, and later enter into sale/leaseback arrangements in order to repay the debt incurred under the Term Loan. But Sun needed time to orchestrate the sale/leaseback transactions. According to a Sun representative:

> We had looked at potentially performing a sale leaseback from our initial involvement in looking at the opportunity, and it took some time for us to go out, contact parties, and negotiate a sale leaseback transaction. But I can't say there was any magic behind the exact date, except for that was the time that we were able to

come to the table with a party to finalise [sic] a sale leaseback.

112. With CIT's active assistance, Sun began to put into motion its plan to sell and lease back Jevic's Real Estate promptly after the acquisition and Re-Financing.

113. From in or around August 2006 through in or around January 2007, Sun executed its plan by causing Jevic to market Jevic' s Real Estate, and to negotiate sale terms.

114. Finally, on January 17, 2007, Sun caused Jevic to complete the Sale-Lease Backs by selling the New Jersey and Illinois properties (the "SLB Properties"), and by simultaneously entering into 20-year leases with the new owners of the properties that contemplated enormous rent obligations for the properties formerly owned outright by Jevic.

115. Jevic's officers and directors breached their fiduciary by authorizing the Sale-Lease Backs in which Jevic's valuable real estate was sold to satisfy Sun's acquisition debt and onerous leases were imposed on Jevic.

116. The SLB Properties were sold for approximately $20 million. In accordance with the Second Amendment, Jevic delivered to CIT all of the net proceeds to (a) pay off the $16.2 million Term Loan, (b) pay down the Revolver by $3 million, and (c) pay transaction fees in the amount of $700,000 (the "Sale-Lease Back Fee," and collectively with the Bridge Loan Fees, the CIT Loan Fees and the Direct Sun Fees, the "Transaction Fees").

117. Following the Sale-Lease Backs and the paying off of the Term Loan, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was now

saddled with 20-year lease commitments with respect to property Jevic had previously enjoyed the use of rent free.

118. As Sun and CIT knew, the SLB Properties were encumbered solely to secure the Term Loan and thereby pay down the Bridge Loan used to finance Sun's acquisition of Jevic, and the Sale-Lease Backs were entered into solely to pay off CIT's Term Loan.

I. Financing of Transaction Fees

119. Upon information and belief, the Transaction Fees were funded with the loan proceeds of the Bridge Loan, the Re-Financing and the sale proceeds from the Sale-Lease Backs. The total amount of the Transaction Fees plus the Direct Sun Fees was $4.9 million, none of which benefited Jevic.

J. Jevic's Downward Spiral Continues

120. The continued deterioration of the trucking industry—the possibility of which was never incorporated into Sun's projections (the Committee is unaware of any iteration of Sun's projections that forecast a decrease in revenue at any time after 2006)—was a hill that Jevic could not climb.

121. Jevic was in default under the severely Modified Fixed Charge Covenant as of September 30, 2007, and Jevic remained in default for the rest of the year.

122. With Jevic in continuing default under the Modified Fixed Charge Covenant and other provisions of the Financing Agreement (the "2007 Defaults"), Jevic, JHC, Creek Road and CIT entered into a Forbearance Agreement and Third Amendment to Financing Agreement on January 8, 2008 (the "Forbearance Agreement").

123. In exchange for CIT's willingness to forebear from exercising its rights flowing from the 2007 Defaults until February 29, 2008 (about seven weeks), CIT extracted the following concessions, among others: (a) Jevic was required to hire an investment advisor within two weeks to assist with the preparation of an offering memorandum in connection with a possible sale; (b) Jevic was required to pay the expenses of a restructuring consultant to be hired by CIT; (c) all LIBOR-based loans were eliminated during the forbearance period; (d) Sun was required to deliver a $2 million guaranty of Jevic's indebtedness; (e) the Line of Credit (as defined in the Financing Agreement) was reduced from $101.2 million to $70 million; and (f) the Revolver was reduced from $85 million to $70 million (*i.e.*, all forms of financing were eliminated except for the Revolver, which itself was reduced).

124. The Forbearance Agreement was amended four times over the following ninety days. In general, the amendments to the Forbearance Agreement further constricted the Revolver; required the retention (at Jevic's expense) of various consultants, appraisers and investment advisors; and ultimately required all Net Cash Proceeds (as defined in the Financing Agreement) to be paid to CIT.

125. On May 20, 2008, less than two years after Sun's acquisition of Jevic, and CIT's Re-Financing, Jevic filed for bankruptcy. Shortly before the bankruptcy filing, the company abruptly ceased all operations, and immediately after the bankruptcy it was liquidated in piece-meal fashion.

126. Jevic was a complete failure under Sun's ownership. Indeed, there was *no* fiscal quarter between Sun's acquisition of Jevic and Jevic's bankruptcy filing

when Jevic met its budget on an EBITDA, revenue or net income basis.

127. Sun and CIT risked nothing on the gamble that Sun's "experience" and "expertise" would revive Jevic's fortunes and generate big returns and fees for them; Jevic's unsecured creditors are now left to deal with the consequences of their failed gamble.

128. Jevic's demise was not the result of some unforeseeable event. Rather, it was the foreseeable end of a reckless course of action in which Sun and CIT bore no risk but all other constituents did.

K. The Sun, Sun Management and Sun Partners Claims

1. Sun's Claims

129. On or about January 20, 2010, Sun filed Proof of Claim No. 1067 against Jevic; Proof of Claim No. 1068 against Creek Road; and Proof of Claim No. 1085 against JHC (these Proofs of Claim are collectively referred to as "Sun's Claims").

130. As Sun acknowledged, the Debtors defaulted under their credit agreement with CIT in 2007 (and 2006). In exchange for entering into the Forbearance Agreement (the term of which was approximately seven weeks), CIT received, among other things, Sun's guaranty of up to $2 million of the Debtors' obligations to CIT (the "Guaranty"). According to Sun's Claim, the Guaranty purports to subrogate Sun "to the Prepetition Lenders' position to the extent of the Guaranty." Sun contends that it paid $2 million pursuant to the Guaranty; that the "Prepetition Facility has now been paid in full, with the exception of the $2 million" allegedly owed to Sun; and that Sun is therefore the holder of a first priority secured lien on the Debtors' assets

(including cash), to the extent of any principal, "accrued interest, fees, expenses or costs in relation to such claim" ("Sun's Purported Liens").

131. At the time Sun executed the Guaranty, and purportedly made the $2 million payment required thereunder, the Guaranty was on terms that no reasonable third-party lender would have lent money to the Debtors.

2. Sun Management's Claims

132. On or about January 20, 2010, Sun Management filed Proof of Claim No. 1087 against Jevic ("Sun Management's Claim").

133. Sun Management alleges that it entered into a "Management Services Agreement" with Jevic and its Claim is "for any amounts due and owing under the Management Services Agreement, including the indemnification and expense reimbursement provisions thereof."

3. Sun Partners' Claims

134. On or about January 20, 2010, Sun Partners filed Proof of Claim No. 1086 against JHC; Proof of Claim No. 1088 against Creek Road; and Proof of Claim No. 1089 against Jevic (these Proofs of Claim are collectively referred to as "Sun Partners' Claims," and collectively with Sun's Claims and Sun Management's Claim, the "Sun Group Claims").

135. Sun Partners is purportedly a Defendant in Adversary Case No. 08-50662 (Bankr. D. Del.), and in an unidentified case pending in an unidentified New Jersey state court (together, the "Proceedings").

136. Each of Sun Partners' Claims is identical. Sun Partners alleges in each of its Proofs of Claim that "[t]o

the extent that (Sun Partners] has any cross-claims or other claims against any of the Debtors relating to the Proceedings ... [Sun Partners] hereby preserves such claims herein.

FIRST CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§548 and 550)

137. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

138. Since June 2006, the Debtors directly or indirectly, voluntarily or involuntarily, made transfers and conveyances, and incurred obligations, in an amount to be determined, to CIT for, including without limitation, the pledging to CIT of liens on the Debtors assets, including without limitation, the Debtors' valuable real estate, and the debt obligations that the Debtors incurred to finance the acquisition of Jevic by Sun.

139. Pursuant to section 548(a) of the Bankruptcy Code, the Debtors received less than reasonably equivalent value from CIT in exchange for such transfers, conveyances, and incurrences of obligations.

140. At the time of each transfer and incurred obligation, the Debtors (i) were insolvent or became insolvent as a result of such transfers and incurrences of obligations, (ii) were engaged in business for which their remaining property was an unreasonably small capital, or (iii) intended to incur, or believed they would incur, debts that were beyond their ability to repay as they matured.

141. Pursuant to section 550 of the Bankruptcy Code such transfers are voidable by the Debtor.

142. Accordingly, Plaintiff is entitled to void such transfers and obligations and to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

SECOND CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§548 and 550)

143. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

144. In January, 2007, the Debtors directly or indirectly, voluntarily or involuntarily, made transfers and conveyances in connection with the Sale-Lease Back and the resulting repayment of the Term Loan.

145. Pursuant to section 548(a) of the Bankruptcy Code, the Debtors received less than reasonably equivalent value because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free.

146. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors (i) were insolvent or became insolvent as a result of such transfers and incurrences of obligations, (ii) were engaged in business for which their remaining property was an unreasonably small capital, or (iii) intended to incur, or

believed they would incur, debts that were beyond their ability to repay as they matured.

147. Pursuant to section 550 of the Bankruptcy Code such transfers and incurred obligations in the amount of approximately $16,200,000.00 are voidable by the Debtor.

148. Accordingly, Plaintiff is entitled to void such transfers and obligations and to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

THIRD CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-25(b) and 2-29)

149. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

150. CIT and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions-would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

151. The Debtors did not receive reasonably equivalent value in exchange for the liens on Jevic's assets that were pledged to CIT as security for the Re-Financing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun.

152. At the time that CIT obtained liens on the Debtors' assets and the Debtors incurred debt obligations to CIT, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to the business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 25:2-25(b) of the New Jersey Statutes.

153. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

154. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors should be avoided pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-25(b) and 2-29 of the New Jersey Statutes.

155. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of CIT. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of the liens from CIT and all amounts that the Debtors have repaid on fraudulently incurred obligations.

156. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-25(b) and 2-29 of the New Jersey Statutes, such transfers, conveyances and incurrences of obligations are voidable.

157. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

FOURTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-27and 2-29)

158. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

159. CIT and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

160. The Debtors (a) did not receive reasonably equivalent value in exchange for the liens on Jevic's as-

sets that were pledged to CIT as security for the Re-Financing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun, and (b) were insolvent at that time or became insolvent as a result of the transfer within the meaning of section 25:2-27 of the New Jersey Statutes.

161. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

162. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors should be avoided pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes.

163. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of CIT. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of the liens from CIT and all amounts that the Debtors have repaid on fraudulently incurred obligations.

164. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes, such transfers, conveyances and incurrences of obligations are voidable.

165. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

FIFTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-25(b) and 2-29)

166. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

167. CIT and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens to CIT on the Debtors' valuable assets, including, without limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

168. The Debtors did not receive reasonably equivalent value in connection with the Sale-Lease Back and the resulting repayment of the Term Loan because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free.

169. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors (a) were engaged or about to engage in a business for which their

remaining assets and/or capital were unreasonably small in relation to the business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond its ability to pay as they became due within the meaning of section 25:2-25(b) of the New Jersey Statutes.

170. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

171. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-25(b) and 2-29 of the New Jersey Statutes, the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

172. Accordingly, Plaintiff is entitled to void such transfers and to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

SIXTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-27 and 2-29)

173. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

174. CIT and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens to

CIT on the Debtors' valuable assets, including, without limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

175. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors did not receive reasonably equivalent value in connection with the Sale-Lease Back and the resulting repayment of the Term Loan because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free, and the Debtors were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO and Sale-Leaseback within the meaning of section 25:2-27 of the New Jersey Statutes.

176. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

177. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes, the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

178. Accordingly, Plaintiff is entitled to void such transfers and to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

SEVENTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1304(a) and 1307)

179. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

180. CIT and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

181. The Debtors did not receive reasonably equivalent value in exchange for the liens on Jevic's assets that were pledged to CIT as security for the Re-Financing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun.

182. At the time that CIT obtained liens on the Debtors' assets and the Debtors incurred debt obliga-

tions to CIT, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to the business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due; within the meaning of section 1304(a) of Title 6 of the Delaware Code.

183. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

184. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors should be avoided pursuant to applicable provisions of sections 544(b) and 550 of the Bankruptcy Code and sections 1304(a) and 1307 of Title 6 of the Delaware Code.

185. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of CIT. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of the liens from CIT and all amounts that the Debtors have repaid on fraudulently incurred obligations.

186. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1304(a) and 1307 of Title 6 of the Delaware Code, conveyances and incurrences of obligations are voidable.

187. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

EIGHTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1805, and 1307)

188. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

189. CIT and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

190. The Debtors (a) did not receive reasonably equivalent value in exchange for the liens on Jevic's assets that were pledged to CIT as security for the Re-Financing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun, and (b) were insolvent at that time or became in-

solvent as a result of the transfer within the meaning of section 1305 of Title 6 of the Delaware Code.

191. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

192. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors should be avoided pursuant to applicable provisions of sections 544(b) and 550 of the Bankruptcy Code and sections 1305 and 1307 of Title 6 of the Delaware Code.

193. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of CIT. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of the liens from CIT and all amounts that the Debtors have repaid on fraudulently incurred obligations.

194. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1305 and 1307 of Title 6 of the Delaware Code, conveyances and incurrences of obligations are voidable.

195. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

NINTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1304(a) and 1307)

196. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

197. CIT and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens to CIT on the Debtors' valuable assets, including, without limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

198. The Debtors did not receive reasonably equivalent value in connection with the Sale-Lease Back and the resulting repayment of the Term Loan because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free.

199. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors (a) were engaged or about to engage in a business for which their

remaining assets and/or capital were unreasonably small in relation to the business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 1304(a) of Title 6 of the Delaware Code.

200. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

201. Pursuant to sections 544(b) and 550 of the Bankruptcy Code sections 1304 and 1307 of Title 6 of the Delaware Code, the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

202. Accordingly, Plaintiff is entitled to void such transfers and to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

TENTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1305 and 1307)

203. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

204. CIT and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens

to CIT on the Debtors' valuable assets, including, without limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

205. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors did not receive reasonably equivalent value in connection with the Sale-Lease Back and the resulting repayment of the Term Loan because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free, and the Debtors were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO and Sale-Leaseback within the meaning of section 1305 of Title 6 of the Delaware Code.

206. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

207. Pursuant to sections 544(b) and 550 of the Bankruptcy Code sections 1305 and 1307 of Title 6 of the Delaware Code, the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

208. Accordingly, Plaintiff is entitled to void such transfers and to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

ELEVENTH CLAIM FOR RELIEF
(Against CIT)
(Equitable Subordination and Subordination—
11 U.S.C. §510)

209. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

210. CIT asserts a claim against each of the Debtors' estates in the amount of $50,417,204.27 (collectively, the "*CIT Claims*"). These claims were paid off pursuant to the final DIP financing order, subject to disgorgement.

211. CIT was an active participant in the disastrous Jevic leveraged buyout and profited handsomely in the form of interest, fees and other charges in connection therewith. CIT also contributed in active ways and encouraged the transaction's highly leveraged structure which led to the failure of the business and millions of dollars of employee, vendor and governmental claims going unpaid. As alleged herein, CIT actively participated in the development of Jevic' s financial projections used to support the transaction—an even more leveraged one than originally proposed—in order to enable its syndication of the loans. These projections turned out to be a recipe for Jevic's failure, as it was unable from the inception to meet any of these projections, or to sustain the overwhelming debt burden it took on and also meet its ordinary business obligations as they came due. Jevic's abrupt failure and consequent liquidation enabled CIT to recover on its senior secured loans but all other creditors were left holding the bag, creditors who had no involvement with the

formulation of the LBO nor profited from it but were victims of a scheme concocted by the architects of the LBO, including CIT, who did profit from it and bore little or no risk from the outset.

212. Sun's initial forecasts to support the LBO projected that Jevic would experience (a) revenue growth of -3.0% in 2006; 0% in 2007; 1% in 2008; and 2% in 2009; and (b) EBITDA growth of -32.0% in 2006; 30.3% in 2007; 25.1 % in 2008; and 23.4% in 2009. Thereafter, Sun developed a "Base Case" projection in June of 2006 which improved the forecast to (a) revenue (excluding fuel surcharge) growth of -5.0% in 2006; 3.0% in 2007; 4% in 2008; and 5% in 2009; and (b) EBITDA growth of -50.4% in 2006; 64.1 % in 2007; 25% in 2008; and 21.2% in 2009.

213. Significantly, even with June's stepped-up forecasts (as compared to the earlier version), Sun's June "Base Case" still failed to project sufficient EBITDA to meet the EBITDA and Fixed Charge covenants that were ultimately incorporated into CIT's financing agreement. Upon information and belief, using Sun's already rosy Base Case financial projections, CIT was not able to succeed in syndicating the LBO loans. Consequently, CIT pushed Sun to provide even more aggressive projections.

214. In July, Sun prepared the Enhanced Projection that were used by CIT to syndicate the $101.2 million Re-Financing. The Enhanced Projections were even more unrealistic, but they were used to syndicate an even larger financing. Whereas before Sun and CIT were contemplating $86.4 million in financing, including a $70 million Revolver, reliance on the Enhanced Projection enabled CIT to offer an even larger financing package of $101.2 million. This increase (a) reduced the

amount of capital Sun would put into the deal, and (b) increased the size of the loans and thereby increasing CIT' s fees on the deal and interest to be earned in the future.

215. The direct result of CIT's role in encouraging Sun to prepare unrealistic financial projections in order to facilitate syndication of the LBO loans was the infliction of massive debt on Jevic's creditors.

216. But for CIT's conduct, Sun would not have revised its already overly optimistic projections further upwards, and it did so in order to facilitate CIT's syndication of the LBO loans. CIT profited in the form of substantial fees and charges, as well as interest and the recovery of its principal while all of Jevic's other creditor were left with nothing. Jevic simply could not withstand even the slightest vicissitudes given how highly it became leveraged, and its inevitable failure was abrupt and catastrophic. All employees were laid off without notice, trucks were left on the side of the road, and the business was sold in piecemeal fashion. As a consequence of its willing participation in and encouragement of Jevic LBO, from which it profited handsomely and recovered its principal while others were left with nothing, CIT's claims should be equitably subordinated below the claims of prepetition general unsecured creditors.

217. Consistent with section 510(c) of the Bankruptcy Code, the CIT Claims should be equitably subordinated to other claims against the Debtors.

TWELFTH CLAIM FOR RELIEF
(Against CIT)
(Avoidance of Preferential Transfers—11 U.S.C. §§547 and 550)

218. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

219. Upon information and belief within ninety days prior to the Petition Date, the Debtors made at least the following transfers to CIT:

Check Date	Amount
02/29/08	132,066.47
02/29/08	5,134.74
02/29/08	-
02/29/08	94,115.03
03/31/08	127,174.31
03/31/08	5,899.58
03/31/08	-
03/31/08	155,414.30
04/30/08	113,266.94
04/30/08	2,908.07
04/30/08	67,598.81
04/30/08	1,791,402.91
05/20/08	115,064.97
05/20/08	923.40
05/20/08	41,279.41
05/20/08	575,351.94

220. The transfers were made on account of alleged antecedent debts owed by the Debtor to CIT.

221. The transfers were made while the Debtors were insolvent.

222. The transfers enabled CIT to receive more than it would have received if the Debtors' cases were cases under Chapter 7 of the Bankruptcy Code, if the transfers had not been made, and/or if it received payment on the debt to the extent provided by the Bankruptcy Code.

223. Accordingly, Plaintiff is entitled to void such transfers and to a monetary judgment against CIT in an amount to be determined at trial, plus interest.

THIRTEENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§548 and 550)

224. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

225. Since June 2006, the Debtors directly or indirectly, voluntarily or involuntarily, made transfers and conveyances, and incurred obligations, in an amount to be determined, for the benefit of Sun, including without limitation, the pledging to CIT of liens on the Debtors assets, including without limitation, the Debtors' valuable real estate, and the debt obligations that the Debtors incurred to finance the acquisition of Jevic by Sun.

226. Pursuant to section 548(a) of the Bankruptcy Code, the Debtors received less than reasonably equivalent value from Sun in exchange for such transfers, conveyances, and incurrences of obligations for Sun's benefit.

227. At the time of each transfer and incurred obligation, the Debtors (i) were insolvent or became insolvent as a result of such transfers and incurrences of ob-

ligations, (ii) were engaged in business for which their remaining property was an unreasonably small capital, or (iii) intended to incur, or believed they would incur, debts that were beyond their ability to repay as they matured.

228. Pursuant to section 550 of the Bankruptcy Code, such transfers are voidable by the Debtor.

229. Accordingly, Plaintiff is entitled to void such transfers and obligations and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

FOURTEENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations
11 U.S.C. §§548 and 550)

230. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

231. In January 2007, the Debtors directly or indirectly, voluntarily or involuntarily, made transfers and conveyances in connection with the Sale-Lease Back and the resulting repayment of the Term Loan for the benefit of Sun.

232. Pursuant to section 548(a) of the Bankruptcy Code, the Debtors received less than reasonably equivalent value because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free.

233. At the time of the Sale-Lease Back and the repayment of the Term Loan for Sun's benefit, the Debtors (i) were insolvent or became insolvent as a result of such transfers and incurrences of obligations, (ii) were engaged in business for which their remaining property was an unreasonably small capital, or (iii) intended to incur, or believed they would incur, debts that were beyond their ability to repay as they matured.

234. Pursuant to section 550 of the Bankruptcy Code, such transfers and incurred obligations in the amount of approximately $16,200,000.00 are voidable by the Debtor.

235. Accordingly, Plaintiff is entitled to void such transfers and obligations and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

FIFTEENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§548 and 550)

236. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

237. Since June 2006, the Debtors directly or indirectly, voluntarily or involuntarily, made transfers and conveyances, and incurred obligations, in an amount to be determined, for the benefit of Sun, including without limitation, the pledges of assets that ultimately became subject to Sun's Purported Lien.

238. Pursuant to section 548(a) of the Bankruptcy Code, the Debtors received less than reasonably equivalent value from Sun in exchange for such transfers,

conveyances, and incurrences of obligations for Sun's benefit.

239. At the time the Debtors pledged to CIT the assets that ultimately became subject to Sun's Purported Lien, the Debtors (i) were insolvent or became insolvent as a result of such transfers and incurrences of obligations, (ii) were engaged in business for which their remaining property was an unreasonably small capital, or (iii) intended to incur, or believed they would incur, debts that were beyond their ability to repay as they matured.

240. Pursuant to section 550 of the Bankruptcy Code, the pledges that ultimately became subject to Sun's Purported Lien are voidable by the Debtor.

241. Accordingly, Plaintiff is entitled to void the pledge of assets that ultimately became subject to Sun's Purported Lien and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

SIXTEENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§548 and 550)

242. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

243. Pursuant to section 548(a) of the Bankruptcy Code, the Debtors received less than reasonably equivalent value in connection with the pledge of assets to CIT that ultimately became subject to Sun's Purported Lien.

244. At the time the Debtors pledged the assets to CIT that ultimately became subject to Sun's Purported Lien, the Debtors (i) were insolvent or became insolvent as a result of such transfers and incurrences of obligations, (ii) were engaged in business for which their remaining property was an unreasonably small capital, or (iii) intended to incur, or believed they would incur, debts that were beyond their ability to repay as they matured.

245. Pursuant to section 550 of the Bankruptcy Code, such transfers and incurred obligations are voidable by the Debtor.

246. Accordingly, Plaintiff is entitled to void such transfers and obligations and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

SEVENTEENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations
11 U.S.C. §§548 and 550)

247. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

248. In July 2006 and April 2008, the Debtors directly or indirectly, voluntarily or involuntarily, made transfers and conveyances for the benefit of Sun in connection with the Sun Fees in the amount of $797,009.85. In addition, the Debtors directly or indirectly, voluntarily or involuntarily made transfers and conveyances for the payment of the fees and expenses of the lenders and other third parties in connection with

the Bridge Loan, the Refinancing and the Sale-Lease Back that were part of the LBO for the benefit of Sun.

249. Pursuant to section 548(a) of the Bankruptcy Code, the Debtors received less than reasonably equivalent value because the Transaction Fees and the Direct Sun Fees did not provide any benefit to the Debtors.

250. At the time that the Transaction Fees and the Direct Sun Fees were paid, the Debtors (i) were insolvent or became insolvent as a result of such transfers and incurrences of obligations, (ii) were engaged in business for which their remaining property was an unreasonably small capital, or (iii) intended to incur, or believed they would incur, debts that were beyond their ability to repay as they matured.

251. Pursuant to section 550 of the Bankruptcy Code, such transfers and incurred obligations in the amount of approximately $4.1 million for the Transaction Fees and $797,009.85 for the Sun Direct Fees are voidable by the Debtor.

252. Accordingly, Plaintiff is entitled to void such transfers and obligations and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

EIGHTEENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-25(b) and 2-29)

253. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

254. Sun and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

255. The Debtors did not receive reasonably equivalent value in exchange for the liens on Jevic's assets that were pledged to CIT for the benefit of Sun as security for the Re-Financing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun.

256. At the time that Sun caused the Debtors to incur the liens on their assets and incur debt obligations for the benefit of Sun, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to their business, and/or (b) intended to incur, believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 25:2-25(b) of the New Jersey Statutes.

257. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

258. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors should be avoided pursuant to applicable provisions of sections 544(b) and 550 of the Bankruptcy Code and section 25:2-29 of the New Jersey Statutes.

259. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of those liens from Sun and all amounts that the Debtors have repaid on fraudulently incurred obligations.

260. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-25(b) and 2-29 of the New Jersey Statutes, such transfers, conveyances and incurrences of obligations are voidable.

261. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

NINETEENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-27 and 2-29)

262. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

263. Sun and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

264. The Debtors (a) did not receive reasonably equivalent value in exchange for the liens on Jevic's assets that were pledged to CIT as security for the Re-Financing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun, and (b) were insolvent at that time or became insolvent as a result of the transfer within the meaning of section 25:2-27 of the New Jersey Statutes.

265. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

266. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors should be avoided pursuant to applicable provisions of sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes.

267. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of those liens from Sun and all amounts that the Debtors have repaid on fraudulently incurred obligations.

268. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes, such transfers, conveyances and incurrences of obligations are voidable.

269. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTIETH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations
11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-25(b) and 2-29)

270. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

271. Sun and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens to CIT on the Debtors' valuable assets, including, without

limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

272. The Debtors did not receive reasonably equivalent value in connection with the Sale-Lease Back and the resulting repayment of the Term Loan incurred for Sun's benefit because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free.

273. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to their business, and/or (b) intended to incur, or reasonably should have believed that it would incur, debts beyond their ability to pay as they became due within the meaning of section 25:2-25(b) of the New Jersey Statutes.

274. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

275. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and section 25:2-25(b) and 2-29 of the New Jersey Statutes, the transfers and conveyances associated with the Sale-Lease Back and the repay-

ment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

276. Accordingly, Plaintiff is entitled to recover the value of such transfers and to monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTY-FIRST CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations
11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-27 and 2-29)

277. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

278. Sun and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens to CIT on the Debtors' valuable assets, including, without limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

279. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors (a) did not receive reasonably equivalent value in connection with

the Sale-Lease Back and the resulting repayment of the Term Loan because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free, (b) incurred, or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due, and (c) were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO and Sale-Leaseback within the meaning of section 25:2-27 of the New Jersey Statutes.

280. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

281. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes, the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

282. Accordingly, Plaintiff is entitled to recover the value of such transfers and to monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTY-SECOND CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-25(b) and 2-29)

283. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

284. Sun asserts that it is "subrogated to the Prepetition Lenders' first priority secured lien in the Debtors' assets," such that Sun "is now the holder of the first priority secured lien in the Debtors' assets," Sun's Purported Lien.

285. The Debtors did not receive reasonably equivalent value in exchange for the pledge of assets that are subject to Sun's Purported Lien.

286. At the time Sun caused the Debtors to pledge the assets that are subject to Sun's Purported Lien, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to their business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 25:2-25(b) of the New Jersey Statutes.

287. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

288. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for

the Re-Financing, including Sun's Purported Lien, were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of Sun's Purported Lien from Sun and all amounts that the Debtors have repaid on fraudulently incurred obligations.

289. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-25(b)and 2-29 of the New Jersey Statutes, Sun's Purported Lien is voidable.

290. Accordingly, Plaintiff is entitled to a judgment avoiding Sun's Purported Liens.

TWENTY-THIRD CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-27 and 2-29)

291. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

292. Sun asserts that it is "subrogated to the Prepetition Lenders' first priority secured lien in the Debtors' assets," such that Sun "is now the holder of the first priority secured lien in the Debtors' assets," Sun's Purported Lien.

293. At the time Sun caused the Debtors to pledge the assets that are subject to Sun's Purported Lien, the Debtors (a) did not receive reasonably equivalent value in exchange for the pledge of assets that are subject to Sun's Purported Lien; and (b) were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO, the Re-Financing, and

Sale-Lease Back within the meaning of section 25:2-27 of the New Jersey Statutes.

294. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

295. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing, including Sun's Purported Lien, were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of Sun's Purported Lien from Sun and all amounts that the Debtors have repaid on fraudulently incurred obligations.

296. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes, Sun's Purported Lien is voidable.

297. Accordingly, Plaintiff is entitled to a judgment avoiding Sun's Purported Liens.

TWENTY-FOURTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations
11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-25(b) and 2-29)

298. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

299. The Debtors did not receive reasonably equivalent value in connection with the pledge of the assets that are the subject of Sun's Purported Lien.

300. At the time the Debtors pledged the assets that are the subject of Sun's Purported Lien, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to the business, and/or (b) intended to incur, or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 25 :2-25(b) of the New Jersey Statutes.

301. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

302. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-25(b) and 2-29 of the New Jersey Statutes, the transfers and conveyances associated with Sun's Purported Lien are voidable.

303. Accordingly, Plaintiff is entitled to recover the value of Sun's Purported Lien and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTY-FIFTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations
11 U.S.C. §§544(b) and 550; New Jersey Statutes 25:2-27 and 2-29)

304. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

305. The Debtors did not receive reasonably equivalent value in connection with the pledge of the assets that are the subject of Sun's Purported Lien.

306. At the time the Debtors pledged the assets that are the subject of Sun's Purported Lien, the Debtors were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO and Sale-Leaseback within the meaning of section 25:2-27 of the New Jersey Statutes.

307. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 25:2-21 of the New Jersey Statutes.

308. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 25:2-27 and 2-29 of the New Jersey Statutes, the transfers and conveyances associated with Sun's Purported Lien are voidable.

309. Accordingly, Plaintiff is entitled to recover the value of Sun's Purported Lien and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTY-SIXTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1304(a) and 1307)

310. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

311. Sun and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related

thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

312. The Debtors did not receive reasonably equivalent value in exchange for the liens on Jevic's assets that were pledged to CIT for the benefit of Sun as security for the Refinancing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun.

313. At the time that Sun caused the Debtors to incur the liens on their assets and incur debt obligations for the benefit of Sun, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to their business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 1304(a) of Title 6 of the Delaware Code.

314. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

315. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT in-

curred by the Debtors should be avoided pursuant to applicable provisions of sections 544(b) and 550 of the Bankruptcy Code and sections 1304(a) and 1307 of Title 6 of the Delaware Code.

316. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of those liens from Sun and all amounts that the Debtors have repaid on fraudulently incurred obligations.

317. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1304(a) and 1307 of Title 6 of the Delaware Code, such transfers, conveyances and incurrences of obligations are voidable.

318. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTY-SEVENTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligation 11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1305 and 1307)

319. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

320. Sun and all of the other participants involved in the LBO, the Re-Financing, and the Sale-Lease Back intended and planned that all transactions related

thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging to CIT of liens on the Debtors' assets, including without limitation, its valuable real estate, in order to refinance the purchase, the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness, and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

321. The Debtors (a) did not receive reasonably equivalent value in exchange for the liens on Jevic's assets that were pledged to CIT as security for the Re-Financing and for the debt obligations to CIT that they incurred in order to finance the acquisition of Jevic by Sun, and/or (b) incurred, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 1305 of Title 6 of the Delaware Code.

322. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

323. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors should be avoided pursuant to applicable provisions of sections 544(b) and 550 of the Bankruptcy Code and sections 1305 and 1307 of Title 6 of the Delaware Code.

324. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments by the Debtors of

debt obligations under their fraudulently incurred obligations to CIT were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of those liens from Sun and all amounts that the Debtors have repaid on fraudulently incurred obligations.

325. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1305 and 1307 of Title 6 of the Delaware Code, such transfers, conveyances and incurrences of obligations are voidable.

326. Accordingly, Plaintiff is entitled to void such transfers and incurrences of obligations and is entitled to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTY EIGHTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations
11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1304(a) and 1307)

327. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

328. Sun and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens to CIT on the Debtors' valuable assets, including, without limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all oth-

er related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

329. The Debtors did not receive reasonably equivalent value in connection with the Sale-Lease Back and the resulting repayment of the Term Loan incurred for Sun's benefit because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free.

330. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to their business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 1304(a) of Title 6 of the Delaware Code.

331. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

332. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1304(a) and 1307 of Title 6 of the Delaware Code, the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

333. Accordingly, Plaintiff is entitled to recover the value of such transfers and to monetary judgment against Sun in an amount to be determined at trial, plus interest.

TWENTY-NINTH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware Code §§1305 and 1307)

334. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

335. Sun and all of the other participants involved in the LBO, the Re-Financing and the Sale-Lease Back intended and planned that all transactions related thereto—including the purchase of Jevic by Sun, the borrowing of funds from CIT, the pledging of liens to CIT on the Debtors' valuable assets, including, without limitation, its real estate, in order to refinance the purchase, and the Sale-Lease Back of the SLB Properties in order to pay down the CIT indebtedness and all other related transactions—would be interdependent related transactions. All of those transactions should be collapsed into a single integrated transaction for purposes of determining whether those transactions were fraudulent as to unsecured creditors of the Debtors.

336. At the time of the Sale-Lease Back and the repayment of the Term Loan, the Debtors (a) did not receive reasonably equivalent value in connection with the Sale-Lease Back and the resulting repayment of the Term Loan because subsequent to the Sale-Lease Back, Jevic (i) no longer owned the SLB Properties; (ii) no longer had any borrowing power associated with the

SLB Properties; and (iii) was saddled with 20-year lease commitments on properties Jevic previously enjoyed rent free, and (b) were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO and Sale-Leaseback within the meaning of section 1305 of Title 6 of the Delaware Code.

337. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

338. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1305 and 1307 of Title 6 of the Delaware Code, the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Term Loan in the amount of approximately $16,200,000.00 are voidable.

339. Accordingly, Plaintiff is entitled to recover the value of such transfers and to monetary judgment against Sun in an amount to be determined at trial, plus interest.

THIRTIETH CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware §§1304(a), and 1307)

340. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

341. Sun asserts that it is "subrogated to the Prepetition Lenders' first priority secured lien in the Debtors' assets," such that Sun "is now the holder of the

first priority secured lien in the Debtors' assets," Sun's Purported Lien.

342. The Debtors did not receive reasonably equivalent value in exchange for the pledge of assets that are subject to Sun's Purported Lien.

343. At the time Sun caused the Debtors to pledge the assets that are subject to Sun's Purported Lien, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to the business, and/or (b) intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 1304(a) of Title 6 of the Delaware Code.

344. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

345. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing, including Sun's Purported Lien, were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of Sun's Purported Lien from Sun and all amounts that the Debtors have repaid on fraudulently incurred obligations.

346. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1304(a) and 1307 of Title 6 of the Delaware Code, Sun's Purported Lien is voidable.

347. Accordingly, Plaintiff is entitled to a judgment avoiding Sun's Purported Liens.

THIRTY-FIRST CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Liens, Fraudulently Incurred Obligations, and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware §§1305, and 1307)

348. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

349. Sun asserts that it is "subrogated to the Prepetition Lenders' first priority secured lien in the Debtors' assets," such that Sun "is now the holder of the first priority secured lien in the Debtors' assets," Sun's Purported Lien.

350. At the time Sun caused the Debtors to pledge the assets that are subject to Sun's Purported Lien, the Debtors (a) did not receive reasonably equivalent value in exchange for the pledge of assets that are subject to Sun's Purported Lien; and (b) were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO, the Re-Financing, and Sale-Lease Back within the meaning of section 1305 of Title 6 of the Delaware Code.

351. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

352. The liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing, including Sun's Purported Lien, were transferred for the benefit of Sun. Under section 550 of the Bankruptcy Code, Plaintiff may recover the value of Sun's Purported Lien from Sun and all

amounts that the Debtors have repaid on fraudulently incurred obligations.

353. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1305 and 1307 of Title 6 of the Delaware Code, Sun's Purported Lien is voidable.

354. Accordingly, Plaintiff is entitled to a judgment avoiding Sun's Purported Liens.

THIRTY-SECOND CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware §§1304(a) and 1307)

355. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

356. The Debtors did not receive reasonably equivalent value in connection with the pledge of the assets that are the subject of Sun's Purported Lien.

357. At the time the Debtors pledged the assets that are the subject of Sun's Purported Lien, the Debtors (a) were engaged or about to engage in a business for which their remaining assets and/or capital were unreasonably small in relation to their business, and/or (b) intended to incur, or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due within the meaning of section 1304(a) of Title 6 of the Delaware Code.

358. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

359. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1304(a) and 1307 of Title 6 of the Delaware Code, the transfers and conveyances associated with Sun's Purported Lien are voidable.

360. Accordingly, Plaintiff is entitled to recover the value of Sun's Purported Lien and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

THIRTY-THIRD CLAIM FOR RELIEF
(Against Sun)
(Avoidance of Fraudulent Transfers, Fraudulently Incurred Obligations and Payments in Respect of Fraudulently Incurred Obligations 11 U.S.C. §§544(b) and 550; 6 Delaware §§1305 and 1307)

361. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though fully set forth herein.

362. The Debtors did not receive reasonably equivalent value in connection with the pledge of the assets that are the subject of Sun's Purported Lien.

363. At the time the Debtors pledged the assets that are the subject of Sun's Purported Lien, the Debtors were insolvent or would be rendered insolvent by the transactions undertaken in connection with the LBO and Sale-Leaseback within the meaning of section 1305 of Title 6 of the Delaware Code.

364. At all relevant times, the Debtors had actual creditors holding unsecured claims allowable within the meaning of sections 502 and 544(b) of the Bankruptcy Code and section 1301 of Title 6 of the Delaware Code.

365. Pursuant to sections 544(b) and 550 of the Bankruptcy Code and sections 1305 and 1307 of Title 6

of the Delaware Code, the transfers and conveyances associated with Sun's Purported Lien are voidable.

366. Accordingly, Plaintiff is entitled to recover the value of Sun's Purported Lien and to a monetary judgment against Sun in an amount to be determined at trial, plus interest.

THIRTY-FOURTH CLAIM FOR RELIEF
(Against Sun, Sun Management and Sun Partners)
(Equitable Subordination and Subordination—
11 U.S.C. §510)

367. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein.

368. Sun asserts that it paid CIT on its limited guaranty and thereby succeeded to a portion of the CIT debt and liens securing same. For all of the reasons supporting equitable subordination of CIT's claims, Sun's claims acquired from CIT by way of subrogation are subject to the same subordination.

369. Additionally, in its own name and right, Sun engaged in conduct that warrants equitable subordination of the CIT claims it acquired by subrogation, including without limitation, Sun's conduct in formulating and executing upon the LBO and Sale-Leaseback transactions as alleged in the Complaint. Sun acquired Jevic for virtually no money, investing only $1 million in equity which it recouped in the form of fees soon thereafter. The LBO of Jevic left it so financially weakened that its failure was inevitable, and its failure harmed creditors of Jevic, including vendors and employees, who were left with no hard assets to satisfy their unpaid liabilities as all of Jevic's assets were

liened up to CIT, and sold, with the proceeds being sufficient to satisfy the CIT debt but no others.

370. Sun's conduct was inequitable and led to injury of Jevic's creditors.

371. Consistent with 11 U.S.C. §510(c), the Sun Claims should be equitably subordinated to other claims against the Debtors.

OBJECTIONS TO SUN'S CLAIMS

372. Plaintiff repeats and realleges the allegations contained in each preceding paragraph of the Complaint as though set forth fully herein

373. In addition to the substantive causes of action against the Guaranty, the Committee objects to Sun's Claims to the extent they are duplicative.

374. The Committee objects to Sun Management's Claim on the grounds that (a) it lacks any specificity upon which to asses [sic] the merits of the claim; (b) upon information and belief, the Management Services Agreement was not negotiated at arms' length and is otherwise unenforceable; (c) as an affiliate of Sun, Sun Management should be estopped from asserting any claim against, or deriving any benefit from, any of the Debtors; (d) upon information and belief, Sun Management's Claim is subject to off-set for preferential payments or fraudulent transfers made by any of the Debtors to Sun Management prior to the Petition Date; and (e) as an affiliate of Sun, Sun Management's Claim should be equitably subordinated to general unsecured claims.

375. The Committee objects to Sun Partners' Claims on the grounds that (a) at least two of the claims are duplicative; (b) none of the Claims identifies the legal or factual basis upon which Sun Partners might

have a "Cross-Claim" or "other Claim" against any of the Debtors; (c) they lack any specificity upon which to assess the merits of the Claims; (d) as an affiliate of Sun, Sun Partners should be estopped from asserting any claim against, or deriving any benefit from, any of the Debtors; and (e) as an affiliate of Sun, Sun Partners' Claims should be equitably subordinated to general unsecured claims.

WHEREFORE, Plaintiff prays for judgment as follows:

1. On the First Claim for Relief, as against CIT, for a determination that the transfers made and the obligations incurred by the Debtors' pledging to CIT of liens on their assets are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

2. On the Second Claim for Relief, as against CIT, for a determination that the transfers made and the obligations incurred by the Debtors in connection with the Sale-Lease Back and resulting repayment of the Term Loan are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

3. On the Third Claim for Relief, as against CIT, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

4. On the Fourth Claim for Relief, as against CIT, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and the debt obligations to CIT incurred by the Debtors are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

5. On the Fifth Claim for Relief, as against CIT, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

6. On the Sixth Claim for Relief, as against CIT, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

7. On the Seventh Claim for Relief, as against CIT, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

8. On the Eighth Claim for Relief, as against CIT, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

9. On the Ninth Claim for Relief, as against CIT, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

10. On the Tenth Claim for Relief, as against CIT, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

11. On the Eleventh Claim for Relief, as against CIT, for equitable subordination and subordination of the claims asserted by CIT below the level of claims of general unsecured creditors of the Debtors.

12. On the Twelfth Claim for Relief, as against CIT, for a determination that the transfers are avoidable and for recovery of the transfers or the value of the property transferred in an amount to be determined at trial, plus interest.

13. On the Thirteenth Claim for Relief, as against Sun, for a determination that the transfers and conveyances made and the obligations incurred by the Debtors for the benefit of Sun including without limitation, the pledging to CIT of liens on the Debtors assets, including without limitation, the Debtors' valuable real estate, and the debt obligations that the Debtors incurred to finance the acquisition of Jevic by Sun are avoidable, for recovery of the transfers or the value of the property transferred for its benefit, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

14. On the Fourteenth Claim for Relief, as against Sun, for a determination that the transfers and incurred obligations for the benefit of Sun in the approximate amount of $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred for its benefit, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

15. On the Fifteenth Claim for Relief, as against Sun, for a determination that the transfers made and the obligations incurred in the putative creation of Sun's Purported Lien are avoidable, and for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and avoidance of the obligations incurred.

16. On the Sixteenth Claim for Relief, as against Sun, for a determination that the transfers made and the obligations incurred in the putative creation of Sun's Purported Lien are avoidable, and for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and avoidance of the obligations incurred.

17. On the Seventeenth Claim for Relief, as against Sun, for a determination that the transfers made and the obligations incurred in the amount of approximately $4.1 million for the Transaction Fees and $797,009.85 for the Sun Direct Fees are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

18. On the Eighteenth Claim for Relief, as against Sun, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

19. On the Nineteenth Claim for Relief, as against Sun, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

20. On the Twentieth Claim for Relief, as against Sun, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

21. On the Twenty-First Claim for Relief, as against Sun, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

22. On the Twenty-Second Claim for Relief, as against Sun, for a determination that the liens, including Sun's Purported Lien, on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing were transferred for the benefit of Sun and all amounts that the Debtors have repaid are fraudulently incurred obligations which are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

23. On the Twenty-Third Claim for Relief, as against Sun, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing, including Sun's Purported Lien, and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

24. On the Twenty-Fourth Claim for Relief, as against Sun, for a determination that Sun's Purported Liens on the Debtors' assets and the proceeds thereof are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount

to be determined at trial, plus interest, and the avoidance of obligations incurred.

25. On the Twenty-Fifth Claim for Relief, as against Sun, for a determination that Sun's Purported Liens on the Debtors' assets and the proceeds thereof are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

26. On the Twenty-Sixth Claim for Relief, as against Sun, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

27. On the Twenty-Seventh Claim for Relief, as against Sun, for a determination that the liens on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing and all payments made by the Debtors on account of their debt obligations are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

28. On the Twenty-Eighth Claim for Relief, as against Sun, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property trans-

ferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

29. On the Twenty-Ninth Claim for Relief, for a determination that the transfers and conveyances associated with the Sale-Lease Back and the repayment of the Terms Loan in the amount of approximately $16,200,000.00 are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

30. On the Thirtieth Claim for Relief, as against Sun, for a determination that the liens, including Sun's Purported Lien, on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing were transferred for the benefit of Sun and all amounts that the Debtors have repaid are fraudulently incurred obligations which are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

31. On the Thirty-First Claim for Relief, as against Sun, for a determination that the liens, including Sun's Purported Lien, on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing were transferred for the benefit of Sun and all amounts that the Debtors have repaid are fraudulently incurred obligations which are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

32. On the Thirty-Second Claim for Relief, as against Sun, for a determination that Sun's Purported Liens on the Debtors' assets and the proceeds thereof are avoidable, for recovery of the transfers or the value

of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

33. On the Thirty-Third Claim for Relief, as against Sun, for a determination that Sun's Purported Liens on the Debtors' assets and the proceeds thereof are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

34. On the Thirty-Fourth Claim for Relief, as against Sun, the recharacterization of the Sun Claims as equity or, in the alternative, for equitable subordination and subordination of the Sun Claims below the level of claims of general unsecured creditors of the Debtors.

35. On the objection to the Sun Claims, the expunging of the Sun Claims or equitably subordinating them to general unsecured claims.

36. Such other and further relief as is just and proper.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 08-11006 (BLS)
(Jointly Administered)
Adv. Pro. No. 08-51903 (BLS)

November 4, 2011

IN RE JEVIC HOLDING CORPORATION, *et al.*,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ON BEHALF OF THE BANKRUPTCY ESTATES OF JEVIC HOLDING CORPORATION, *et al.*,
Plaintiff,

v.

CIT GROUP/BUSINESS CREDIT, INC., IN ITS CAPACITY AS AGENT, SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, AND SUN CAPITAL PARTNERS, INC.,
Defendants.

SUN DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT AND OBJECTION TO CLAIMS

Defendants Sun Capital Partners IV, LP, Sun Capital Partners Management IV, LLC, and Sun Capital Partners, Inc. (collectively "Sun Defendants"[1]) respond

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[1] Although answering collectively in form for the convenience of the parties and the Court, the Sun Defendants are separate le-

to the Second Amended Complaint and Objection to Claims filed by the Official Committee of Unsecured Creditors of Jevic Holding Corp. (the "Committee"), by generally denying that the transaction and agreements entered into in connection with the acquisition of the Jevic Transportation, Inc. ("Jevic Transportation") subsidiary from SCS Transportation, Inc. constituted or subsequently resulted in fraudulent transfers, deny the allegations in the Second Amended Complaint and Objection to Claims to the extent not specifically admitted hereafter, and respond to the Second Amended Complaint as follows:

PRELIMINARY STATEMENT[2]

1. Like a borrower who put virtually no money down to acquire a house on the misguided belief that home values would only rise, Sun acquired Jevic with virtually none of its own money based on baseless projections of almost immediate growth and increasing profitability. The only differences were that Sun believed that it would never be responsible to repay the debt used to acquire Jevic, and Sun knew that Jevic's value had already declined considerably over a prolonged period of time.

1. Sun Defendants deny the allegations in Paragraph 1.

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gal entities that each respond independently to the allegations contained in the Amended Complaint and Objection to Claims.

[2] For the Court's convenience, Sun Defendants have retained the original paragraph and section headings that Plaintiff includes in the Second Amended Complaint. To the extent that the headings purport to make factual allegations or otherwise characterized the nature of this action, Sun Defendants deny any such allegations.

2. With CIT's active assistance, Sun acquired Jevic on the backs of Jevic's creditors. Sun orchestrated a leveraged buyout (the "LBO") whereby Jevic's assets were leveraged to enable a Sun affiliate to pay a total adjusted purchase price of $77.4 million, consisting of $41.3 million in cash and $36.1 million of assumed liabilities, with no money down.

2. Sun Defendants admit that Sun Transportation, LLC, a wholly owned subsidiary of Sun Capital Partners IV, LP, acquired Jevic Holding Corporation ("Jevic Holding"), which acquired Jevic Transportation from SAIA and SCS Transportation on June 30, 2006. Sun Defendants also admit that the cash consideration from the acquisition was $41.2 million. Sun Defendants deny the remaining allegations in Paragraph 2.

3. The acquisition costs were initially financed via a $90 million bridge loan. As planned, CIT, for itself and as agent for its syndication partners, refinanced those costs four weeks later in the form of $101.2 million of asset-based financing. Sun took virtually no risk on this gamble, contributing only $1 million in equity, most of which it got back in "fees." Sun's transaction costs for the LBO were funded through loan proceeds derived from liens on Jevic's assets. Furthermore, CIT, who was purportedly fully secured, did not face any risk either.

3. Sun Defendants admit that Jevic Holding received a line of credit up to an aggregate amount of $90,000,000 from Bank of Montreal ("BMO") pursuant to the BMO Loan Authorization Agreement that was used in part for its acquisition of Jevic Transportation from SAIA and SCS Transportation. Sun Defendants also admit that on July 28, 2006, Jevic Transportation entered into an aggregate $101.2 million secured credit

agreement (the "Financing Agreement") with the CIT Group/Business Credit, Inc. ("CIT") as agent, and certain other lenders and lienholder parties thereto, which included an $85 million revolving credit line and a $16.2 million term loan. Sun Defendants further admit that an equity contribution of $1 million was paid toward the purchase price. Sun Defendants deny the remaining allegations in Paragraph 3.

* * *

406. On the Thirty-First Claim for Relief, as against Sun, for a determination that the liens, including Sun's Purported Lien, on the Debtors' assets and the proceeds thereof that were pledged to CIT as security for the Re-Financing were transferred for the benefit of Sun and all amounts that the Debtors have repaid are fraudulently incurred obligations which are avoidable, for recovery of the transfers or the value of the property transferred, in an amount to be determined at trial, plus interest and the avoidance of obligations incurred.

406. Sun Defendants deny that Plaintiff is entitled to the relief sought in Paragraph 406.

407. On the Thirty-Second Claim for Relief, as against Sun, for a determination that Sun's Purported Liens on the Debtors' assets and the proceeds thereof are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

407. Sun Defendants deny that Plaintiff is entitled to the relief sought in Paragraph 407.

408. On the Thirty-Third Claim for Relief, as against Sun, for a determination that Sun's Purported Liens

on the Debtors' assets and the proceeds thereof are avoidable, for recovery of the transfers or the value of the property transferred for its benefit in an amount to be determined at trial, plus interest, and the avoidance of obligations incurred.

408. Sun Defendants deny that Plaintiff is entitled to the relief sought in Paragraph 408.

409. On the Thirty-Fourth Claim for Relief, as against Sun, the recharacterization of the Sun Claims as equity or, in the alternative, for equitable subordination and subordination of the Sun Claims below the level of claims of general unsecured creditors of the Debtors.

409. Sun Defendants deny that Plaintiff is entitled to the relief sought in Paragraph 409.

410. On the objection to the Sun Claims, the expunging of the Sun Claims or equitably subordinating them to general unsecured claims.

410. Sun Defendants deny that Plaintiff is entitled to the relief sought in Paragraph 410.

411. Such other and further relief as is just and proper.

411. Sun Defendants deny that Plaintiff is entitled to the relief sought in Paragraph 411.

First Defense

The Amended Complaint fails to state a claim upon which relief can be granted.

Second Defense

The Committee's claims are barred, in whole or in part, by 11 U.S.C. § 548(a)(1)(B), in that the Committee will be unable to prove that Debtors' received less than

reasonably equivalent value in exchange for the alleged transfers.

Third Defense

The claims asserted in the Complaint are barred because Plaintiffs have suffered no legally cognizable injury or damages by virtue of any conduct alleged in the Complaint.

Fourth Defense

Plaintiff's claims are barred, in whole or in part, by 11 U.S.C. § 548(a)(1)(B) in that Plaintiff will be unable to prove that Debtor was insolvent when the alleged transfers were made, was rendered insolvent as a result of the alleged transfers, possessed unreasonably small capital, or intended or believed it would incur debts beyond its ability to pay as such debts as they became due.

Fifth Defense

Plaintiff's claims are barred, in whole or in part, by the Uniform Fraudulent Transfer Act ("UFTA") in that Plaintiff will be unable to prove that the alleged transfers were made with actual intent to hinder, delay, or defraud any of Debtor's creditors.

Sixth Defense

Plaintiff's claims are barred, in whole or in part, by the UFTA in that Plaintiff will be unable to prove that (1) Debtor received less than reasonably equivalent value in exchange for the alleged transfers, (2) Debtor was engaged, or was about to engage, in a business transaction for which their remaining assets would be unreasonably small in relation to the business or transaction, or (3) Debtor intended or believed that it would incur debts beyond its ability to pay as they became due.

Seventh Defense

Plaintiff cannot show that the acquisition, refinance, or subsequent Sale-Leaseback transactions were for the benefit of the Sun Defendants.

Eighth Defense

Plaintiff's claims are barred, in whole or in part, by the equitable doctrines of unclean hands, laches, waiver, estoppels, unjust enrichment, acquiescence, ratification, or other equitable doctrine.

Ninth Defense

Any losses sustained by Debtors were not caused by any conduct of the Sun Defendants.

Tenth Defense

Plaintiff's alleged injuries and alleged damages were due to, and proximately caused by, in whole or in part, external factors outside of the control of the Sun Defendants.

Eleventh Defense

Sun Defendants assert each and every defense (at law, in equity, or otherwise) available under any and all federal rules and state statutes, laws, rules, or regulations, or the common law.

Reservation of Rights

Sun Defendants have not knowingly or intentionally waived any applicable defenses and reserves the right to assert and rely on such other applicable defenses as may become available or apparent during the proceedings. Sun Defendants further reserve the right to amend their answer and/or defenses accordingly, and/or delete defenses that they determine are not applicable during the course of subsequent discovery.

WHEREFORE, Sun Defendants deny that Plaintiff is entitled to any relief whatsoever and respectfully requests judgment dismissing the Amended Complaint with prejudice and with costs and expenses to the Sun Defendants, and such further relief as the Court deems appropriate.

* * *

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 08-11006 (BLS)
(Jointly Administered)
Adv. Pro. No. 08-51903 (BLS)

November 4, 2011

IN RE JEVIC HOLDING CORPORATION, *et al.*,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ON BEHALF OF THE BANKRUPTCY ESTATES OF JEVIC HOLDING CORPORATION, *et al.*,
Plaintiff,

-against-

THE CIT GROUP/BUSINESS CREDIT, INC., IN ITS CAPACITY AS AGENT, SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, AND SUN CAPITAL PARTNERS, INC.,
Defendants.

THE CIT GROUP/BUSINESS CREDIT, INC.'S ANSWER TO THE SECOND AMENDED COMPLAINT AND OBJECTION TO CLAIMS AND COUNTER-CLAIM

Defendant, The CIT Group/Business Credit, Inc., as Agent ("CIT"), by counsel, for its answer to the Second Amended Complaint and Objection to Claims [Adv. D.I. 43] filed by the Official Committee of Unsecured Creditors of Jevic Holding Corp. (the "Committee"), on

behalf of the estates of Debtors Jevic Holding Corp. ("JHC"), Jevic Transportation, Inc. ("Jevic"), and Creek Road Properties ("Creek Road") (collectively referred to as the "Debtors"), states as follows:

* * *

AFFIRMATIVE AND OTHER DEFENSES

First Defense

The Second Amended Complaint fails to state a claim against CIT upon which relief can be granted.

Second Defense

The claims asserted in the Second Amended Complaint against CIT are barred by releases executed by the Debtors in connection with forbearance agreements dated January 8, 2008; February 22, 2008; February 29, 2008; March 31, 2008; and April 8, 2008; by which the Debtors, on behalf of themselves and their respective successors and assigns released all claims and causes of action of any nature whatsoever, either now accrued or hereafter maturing which the Debtors may have against CIT and each lender to and including the date of the respective Forbearance Agreements by reason of any manner, cause, or thing related to the Forbearance Agreement, the Financing Agreement, other loan documents, or any manner related thereto or rising in connection therewith.

Third Defense

CIT denies that it is indebted to the Debtors, either collectively or individually, in any amount as alleged in the Second Amended Complaint.

Fourth Defense

CIT denies all allegations in the Second Amended Complaint that it has not specifically admitted.

Fifth Defense

The claims asserted in the Second Amended Complaint against CIT are barred in whole or in part by § 546(e) of the Bankruptcy Code.

Sixth Defense

The claims asserted in the Second Amended Complaint against CIT are barred, in whole or in part, by§ 548(a)(l)(B) of the Bankruptcy Code in that the Committee will be unable to prove that the Debtors received less than reasonably equivalent value in exchange for the alleged transfers.

Seventh Defense

The claims asserted in the Second Amended Complaint against CIT are barred because the Debtors have suffered no legally cognizable injury or damages by virtue of any conduct alleged in the Second Amended Complaint.

Eighth Defense

The claims asserted in the Second Amended Complaint against CIT are barred, in whole or in part, by § 548(a)(l)(B) in that the Committee will be unable to prove that the Debtors were insolvent when the alleged transfers were made, was rendered insolvent as a result of the alleged transfers, possessed unreasonably small capital, or intended or believed it would incur debts beyond its ability to pay as such debts became due.

Ninth Defense

The Committee's claims against CIT are barred, in whole or in part, by New Jersey Statute 25:2-25(b), 25:2-27, and 2-29, in that the Committee will be unable to prove that (i) the Debtors received less than reasonably equivalent value in exchange for the alleged transfers, (ii) the Debtors were engaged or about to engage in a business of transaction for which their remaining assets would be unreasonably small in relation to the business or transaction, or (iii) the Debtors intended or believed that they would incur debts beyond their ability to pay as they became due.

Tenth Defense

The Committee's claims against CIT are barred, in whole or in part, by Delaware Code Sections 1304(a), 1305, and 1307, in that the Committee will be unable to prove that (i) the Debtors received less than reasonably equivalent value in exchange for the alleged transfers, (ii) the Debtors were engaged or about to engage in a business of transaction for which their remaining assets would be unreasonably small in relation to the business or transaction, or (iii) the Debtors intended or believed that they would incur debts beyond their ability to pay as they became due.

Eleventh Defense

The Committee cannot show that the Debtors did not receive value in connection with each transfer to CIT.

Twelfth Defense

Any losses sustained by the Debtors were not caused by any conduct of CIT.

Thirteenth Defense

The Committee's alleged injuries and alleged damages were due, and proximately caused, in whole or in part, by external factors outside the control of CIT.

Fourteenth Defense

The Committee's claims against CIT are barred, in whole or in part, by the equitable doctrines of unclean hands, laches, waiver, estoppels, unjust enrichment, acquiescence, ratification, or other equitable doctrine.

Fifteenth Defense

CIT reserves the right to assert each and every defense, at law, in equity, or otherwise, available under any and all Federal Rules and State Statutes, laws, rules, or regulations, or the common law.

Reservation of Rights

CIT has not knowingly or intentionally waived any applicable defenses and reserves the right to assert and rely on such other applicable defenses as may become available or apparent during the proceedings. CIT further reserves the right to amend its answer and/or defenses accordingly and/or delete defenses that it determines are not applicable during the course of subsequent discovery.

WHEREFORE, CIT denies that the Committee is entitled to any relief whatsoever and respectfully requests judgment dismissing the Second Amended Complaint with prejudice and with costs and expenses, including attorneys' fees, to CIT as provided in the loan documents, and such further relief as the Court deems appropriate.

COUNTER-CLAIM

The CIT Group/Business Credit, Inc., as Agent, ("CIT") for its counter-claim against the Official Committee of Unsecured Creditors of Jevic Holding Corp. (the "Committee") which is acting on behalf of the estates of Jevic Holding Corp. ("JHC"), Jevic Transpiration, Inc. ("Jevic"), and Creek Road Properties LLC ("Creek Road"), (collectively referred to as the "Debtors"), by its undersigned counsel, states the following:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action under 28 U.S.C. § 157(a) and 1334. Venue is proper in this District pursuant to 28 U.S.C. § 1408 and 1409.

THE PARTIES

2. The United States Trustee appointed the Committee on or about June 3, 2008.

3. CIT is a New York Corporation, and for itself and as Agent for other participating lenders provided financing to Jevic pursuant to a Financing Agreement dated July 28, 2006 (and with all amendments thereto is hereinafter referred to as the "Financing Agreement").

STATEMENT OF FACTS

4. CIT was owed $50,417,204 under the Financing Agreement on the Petition Date.

5. Pursuant to the Financing Agreement, CIT is entitled to recover its reasonable attorneys fees in connection with the collection, liquidation, enforcement, protection, and defense of all its rights under the Financing Agreement.

6. The Debtors defaulted in their obligations under the Financing Agreement and, as a result, became

liable to pay CIT its reasonable attorneys fees and costs as provided in the Financing Agreement.

7. On May 20, 2008, the Debtors filed petitions for relief under chapter 11 of the United States Bankruptcy Code in this Court.

8. In connection with the bankruptcy filing, CIT as Agent entered into a Senior Debtor In Possession Financing Agreement (the "DIP Financing Agreement") with the Debtors.

9. The Committee has filed a complaint against CIT, which has been amended several times, seeking to set aside liens CIT obtained in connection with the Financing Agreement, recover payments that it received pursuant to the Financing Agreement, and other relief (the "Committee Litigation").

10. Pursuant to this Court's Final Order approving the DIP Financing, CIT is entitled to recover certain costs and expenses, including attorneys fees, incurred in defending against the Committee Litigation.

11. Pursuant to the payoff letter dated March 26, 2009 (the "Payoff Letter"), between CIT and the Debtors, by which the Debtors paid off their indebtedness to CIT under the DIP Financing Agreement, (i) the Debtors acknowledged and agreed that the litigation reserve provided for in the Payoff Letter was an estimate of CIT's expected costs and expenses related to the Committee Litigation, and that CIT expressly reserved all rights and entitlements to all monies lawfully due it under the terms of the Financing Agreement and (ii) the Debtors expressly agreed to reimburse CIT for any such costs and expenses including reasonable attorneys fees, professional fees and costs related to the Committee Litigation in excess of the Litigation Reserve.

WHEREFORE, CIT Group/Business Credit, Inc., as Agent, respectfully request that this Court enter judgment determining that CIT is entitled to recover all of its costs and expenses in defending the Committee Litigation, including reasonable attorneys' fees and other professional fees as provided in the Financing Agreement, the DIP Financing Agreement, the Final Order approving the DIP Financing, and the Payoff Letter.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 08-11006 (BLS)
(Jointly Administered)
Adv. Pro. No. 08-51903 (BLS)

June 27, 2012

IN RE JEVIC HOLDING CORPORATION, *et al.*,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ON BEHALF OF THE BANKRUPTCY ESTATES OF JEVIC HOLDING CORPORATION, *et al.*,
Plaintiff,

-against-

THE CIT GROUP/BUSINESS CREDIT, INC., IN ITS CAPACITY AS AGENT, SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, AND SUN CAPITAL PARTNERS, INC.,
Defendants.

JOINT MOTION OF THE DEBTORS, CIT, SUN CAPITAL AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 105(a), 349 AND 1112(b) AND FED. R. BANKR. P. 9019 FOR ENTRY OF AN ORDER: (I) APPROVING SETTLEMENT AGREEMENT AND RELEASING CLAIMS; (II) DISMISSING THE DEBTORS' CASES UPON IMPLEMENTATION OF SETTLEMENT; AND (III) GRANTING RELATED RELIEF

Jevic Holding Corp. ("*JHC*"), Jevic Transportation Inc. ("*Jevic*") and Creek Road Properties LLC ("*Creek Road*") (collectively the "*Debtors*"), The Official Committee of Unsecured Creditors (the "*Committee*"), Sun Capital Partners IV, LP, Sun Partners Management IV, LLC and Sun Capital Partners, Inc. (collectively, "*Sun*"); and The CIT Group/Business Credit, Inc. as agent ("*CIT*") for the lenders (the "*Lender Group*") under the loan facilities described in the complaint filed in the above-captioned Adversary Proceeding (all hereinafter referred to in this Joint Motion (the "*Joint Motion*") as a "*Party*" or collectively, the "*Parties*"), by and through their respective undersigned counsel, hereby move this Court, pursuant to sections 105(a), 349 and 1112(b) of Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.*, as amended (the "*Bankruptcy Code*"), and Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*"), for entry of an order (the "*Settlement and Dismissal Order*") (i) approving the Settlement Agreement and Release (the "*Settlement Agreement*") entered into between and among the Parties, (ii) dismissing the Debtors' Chapter 11 Cases (defined below) upon implementation of the Settlement Agreement; and (iii) granting related relief. A true and correct copy of the Settlement Agreement is attached hereto as *Exhibit A*. In support of the Joint Motion, the Parties respectfully state the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157(a) and 1334. This is a core proceeding under 28 U.S.C. § 157(b).

2. Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105(a), 349 and 1112(b) of the Bankruptcy Code and Bankruptcy Rule 9019.

FACTUAL BACKGROUND

1. On May 20, 2008 (the "*Petition Date*"), the Debtors filed in this Court voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (the "*Chapter 11 Cases*")[1] and have continued in possession of their property as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. No trustee or examiner has been appointed in these Chapter 11 Cases.

3. On June 4, 2008, the United States Trustee appointed the Committee.

4. Jevic[2] was a hybrid less-than-truckload and truckload carrier that provided regional and interregional time definite delivery across the United States and parts of Canada.

5. The Debtors began operations in 1981, had an initial public offering in 1997, and were acquired by Yellow Corporation in 1999. Jevic was spun off to form SCS Transportation in 2002. In June 2006, Sun Transportation, LLC ("*STL*"), which is owned by Sun Capital Partners, IV, acquired the Debtors.

6. As of the Petition Date, the Debtors were borrowers under a secured credit agreement (the "*Prepeti-*

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[1] JHC was assigned Case No. 08-11006, Jevic was assigned Case No. 08-11008 and Creek Road was assigned Case No. 08-11007.

[2] JHC is the parent of Jevic and Creek Road. All of the Debtors' operations occurred through Jevic.

tion Facility") dated as of July 28, 2006, with CIT and the Lender Group. As of December 31, 2007, the Debtors had $25.4 million of borrowings and $27.8 million of outstanding letters of credit, for a total balance of $53.2 million (the "*Prepetition Debt*"), under the Prepetition Facility.

7. In connection with a forbearance agreement entered into between the Debtors and Lender Group on January 8, 2008, Sun provided a $2 million limited guaranty of the Prepetition Facility. Prior to the Petition Date, Sun paid CIT in respect of such guaranty and thus acquired by subrogation a last-out claim against the Debtors secured by substantially all of the Debtors' assets, which claim is to be allowed pursuant to the Settlement Agreement and Release.

8. Immediately prior to the Petition Date, the Debtors commenced a wind-down process pursuant to which they ceased substantially all of their operations and terminated approximately 90% of their employees. Post-petition, all of the Debtors' tangible assets were liquidated, and the proceeds were used to repay the outstanding obligations owed to the Lender Group under the Prepetition Facility, which had been "rolled up" into the DIP financing facility. See Final Order (i) Authorizing Debtors-in-Possession to Obtain Senior Debtor in Possession Financing; (ii) Granting Liens, Security Interest, and Super Priority Status; (iii) Authorizing Use of Cash Collateral; and (iv) Affording Adequate Protection to Prepetition Lenders entered on June 20, 2008 (the "*Final DIP Financing Order*") [Docket No. 118].

9. Pursuant to the Final DIP Financing Order, the Committee was granted standing to assert claims against the Lender Group as set forth therein. Pursuant to that Order, on December 31, 2008, the Commit-

tee commenced an adversary proceeding by filing a complaint against CIT, Adv. Pro No. 08-51903 (BLS) (the "*Adversary Proceeding*") asserting claims arising from Sun's acquisition of Jevic pursuant to a leveraged buyout. The complaint was later amended on June 30, 2010 to add the Sun parties as defendants. Following a ruling by the Court on CIT's motion to dismiss the complaint rendered on September 15, 2011, the Committee filed a second amended complaint against CIT and Sun on October 7, 2011, to which Sun has filed responsive pleadings and CIT has filed responsive pleadings including a counterclaim against the Committee.

10. Rather than litigate the claims in the Adversary Proceeding, the Parties commenced discussions in March, 2012 regarding the terms under which the Adversary Proceeding could be settled and the Chapter 11 Cases disposed of, insofar as all other assets of the estate (including all avoidance actions) have been monetized and there is no further need for administration of these estates by the Bankruptcy Court once the Adversary Proceeding is resolved. To this end, the parties have reached the terms of the Settlement Agreement. The material provisions of the Settlement Agreement are summarized below.

THE SETTLEMENT AGREEMENT

11. In order to resolve the Adversary Proceeding and bring these Chapter 11 Cases to an orderly conclusion, the Parties have agreed, subject to the Court's approval, to the terms and conditions of the Settlement Agreement which resolve all claims that the Parties may have against each other, and provides for (a) the exchange of releases, (b) the payment of $2,000,000 by CIT to the Debtors, which shall be used to satisfy unpaid chapter 11 allowed administrative claims, (c) the

dismissal with prejudice of the Adversary Proceeding, (d) the assignment by Sun of its lien on the estates' remaining assets to a liquidating trust established by the Debtors as grantor, pursuant to the Settlement Agreement, for the exclusive benefit of the Debtors' general unsecured creditors (the "*Trust*"), (e) the reconciliation of administrative and general unsecured claims during the sixty (60) day period following the "*Effective Date*" as that term is defined in the Settlement Agreement, and (f) thereafter, the dismissal of the Chapter 11 Cases.[3]

RELIEF REQUESTED

12. By this Joint Motion the Parties seek entry of the Settlement and Dismissal Order, substantially in the form attached hereto as *Exhibit B* providing for:

a. Authorization and approval of the Settlement Agreement pursuant to Bankruptcy Rule 9019, including the releases described in the Settlement Agreement and dismissal of the Adversary Proceeding with prejudice; and

b. Dismissal of the Chapter 11 Cases upon the reconciliation and payment of administrative expenses and reconciliation of any remaining disputed general unsecured claims, satisfaction of all unpaid Chapter 11 administrative claims expenses, and upon the Effective Date, the assignment by Sun of its lien on the estates' remaining funds to the Trust pursuant to the Settlement Agreement.

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[3] The above description of the Settlement Agreement is provided as a summary only, and if there is any conflict between the terms described herein and the Settlement Agreement, the terms of the Settlement Agreement shall control.

A. Proposed Procedures for Payment of Administrative Expenses Other Than Professional Fees

13. Presently, there are no unencumbered assets in the Debtors' estates. All the Debtors' assets, including their tangible assets and all avoidance actions (other than the claims asserted in the Adversary Proceeding) have been fully liquidated, and the only asset in the estate is cash in the approximate amount of $2 million, which is subject to Sun's lien described above. Accordingly, there are no available assets to pay outstanding administrative, priority or general unsecured claims at this time. Pursuant to the Settlement Agreement, provision will be made for the satisfaction in full of all unpaid administrative expenses claims in conjunction with dismissal of the Chapter 11 Cases.

14. More specifically, the Debtors believe that all valid post-petition administrative expenses incurred in the ordinary course of the Debtors' businesses have been paid, except for certain unpaid professional fees and expenses (collectively, the "*Professional Fees*") of the professionals of the Debtors and Committee (collectively, the "*Professionals*"). The Debtors believe the only other valid and unpaid administrative expense claims are those that were timely submitted pursuant to section 503(b)(9) of the Bankruptcy Code (the "*503(b)(9) Claims*") as well as certain post Petition Date Taxes (the "*Admin Taxes*"). A list of the 503(b)(9) Claims and Admin Taxes in the amounts filed prior to the claims bar date is attached as *Exhibit C* hereto.[4] However, in an abundance of caution, the

[4] The claims and amounts set forth on *Exhibit C* are subject to modification after any claims objection is resolved or adjudicated. A final version of *Exhibit C* will be filed with the Certification referenced in paragraph 22 hereof and attached as *Exhibit E* hereto.

Debtors have filed a Motion to set a bar date for filing of administrative claims other than 503(b)(9) Claims and Admin Taxes, which were subject of the bar date previously set in these Chapter 11 Cases.[5] To the extent that any of these claims are disputed, they will be reconciled during the sixty (60) day period following the Effective Date and prior to dismissal of the Chapter 11 Cases.

15. Upon the Effective Date of the Settlement, CIT will pay the sum of $2 million to the Debtors. The Debtors believe that this sum will be sufficient to pay in full all unpaid Professional Fees, as well as all allowed 503(b)(9) Claims and Admin Taxes. The Debtors request authority to pay all 503(b)(9) Claims and Admin Taxes, as set forth on *Exhibit C*, Professional Fees and other allowed administrative claims (collectively, the "*Allowed Administrative Expense Claims*") upon (i) payment of the Administrative Claim Fund as provided for in the Settlement Agreement and (ii) filing with the Bankruptcy Court of the stipulation dismissing with prejudice the Adversary Proceeding.

B. Proposed Procedures for Final Allowance and Payment of Professional Fees

16. On June 20, 2008, the Court entered its Order Pursuant to 11 U.S.C. §§ 105(a) and 331 Establishing Procedures for Interim Compensation of Fees and Reimbursement of Expenses for Professionals [Docket No. 119] (the "*Interim Compensation Procedures Order*"). Since that time, the Professionals have filed interim fee applications pursuant to the Interim Compensation Procedures Order or have otherwise complied

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[5] *See* Amended Order Setting Bar Dates for Filing Proofs of Claim [Docket No. 607] entered November 17, 2009.

with the requirements for compensation under their applicable retention orders. The Professionals' monthly fee applications through [April 2011] (to the extent required) have been filed and approved on an interim basis pursuant to the Interim Compensation Procedures Order..

17. The Professionals shall file final fee applications within twenty (20) days of the Effective Date. Upon entry of an order or orders on the Final Fee Applications, the Debtors' request approval to pay all allowed fees and expenses that remain unpaid to Professionals.

C. Proposed Payment to the Trust for Payments to Holders of General Unsecured Claims

18. Consistent with the Settlement and Dismissal Order and as set forth in the Settlement Agreement, the Debtors and the Committee propose a streamlined and efficient method of making distributions from the Trust to holders of allowed general unsecured claims so that the funds may be distributed to them on a pro rata basis as quickly and easily as possible following the dismissal of the Chapter 11 Cases.

19. The Debtors have engaged in a process to resolve general unsecured claims asserted against the Debtors, including the filing and prosecution of several rounds of claims objections pending before the Court.

20. Annexed as *Exhibit D* to this Joint Motion is a schedule (the "*General Unsecured Claims Schedule*") [6]of the claims the Debtors believe should constitute al-

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[6] The claims and amounts set forth on *Exhibit D* are subject to modification after any claims objection is resolved or adjudicated. A final version of *Exhibit D* will be filed with the Certification referenced in paragraph 22 hereof and attached as *Exhibit E* hereto.

lowed general unsecured claims against their estates (collectively, the "*Allowed GUC Claims*," and each individually, an "*Allowed GUC Claim*") for purposes of distribution under the Settlement Agreement.

21. The amounts set forth on the General Unsecured Claims Schedule represent (a) the general unsecured claim amount set forth in the proof of claim filed by the creditor, if any, on or before the claims bar date, excluding duplicative proofs of claim and excluding claims for which an objection has been adjudicated, and (b) with respect to those holders of general unsecured claims that have not filed a proof of claim, the scheduled general unsecured claim amount, if any, for such creditor set forth in the Debtors' schedules of assets and liabilities, excluding duplicative scheduled amounts or those that were scheduled as "contingent," "unliquidated," or "disputed," to the extent the creditor did not file a timely proof of claim. The Debtors and the Committee do not anticipate further reconciling the Allowed GUC Claim amounts beyond excluding duplicative claims and completing the prosecution of the pending claims objections prior to dismissal of the Chapter 11 Cases. Using the funds subject to Sun's lien assigned to it upon the dismissal of the Chapter 11 Cases, the Trust established under the Settlement Agreement will make distributions to holders of Allowed GUC Claims on a pro rata basis as soon as practicable following the dismissal of the Chapter 11 Cases.

D. Certification of Counsel and Request for Dismissal

22. After the completion of distributions to the Trust, and payment of Allowed Administrative Expense Claims as described above, the Debtors request that the Court dismiss these Chapter 11 Cases upon the filing of a certification of counsel substantially in the

form of *Exhibit E* to this Joint Motion (the "*Certification*") with the Court by the Debtors and the Committee, at which time the Chapter 11 Cases will be dismissed without the need for a further Order of the Court. The Certification will be filed as soon as reasonably practicable following the completion of the satisfaction of all Allowed Administrative Expense Claims as set forth above. Among other things, the Certification will verify (a) that all quarterly fees of the U.S. Trustee have been paid in full; (b) that all Allowed Administrative Expense Claims have been paid in full; and (c) that all remaining funds in the estates, which are subject to Sun's lien, have been transferred to the Trust to make pro rata distributions to holders of Allowed GUC Claims after dismissal of the Chapter 11 Cases, all as contemplated by the Settlement Agreement and the proposed Settlement and Dismissal Order.

23. The Debtors intend to serve the Certification on the general service list established in these Chapter 11 Cases, including the U.S. Trustee, but will not send the Certification to the Debtors' entire matrix of creditors and parties-in-interest, as such parties will receive reasonable notice of the proposed dismissal through service of the Joint Motion and/or the Notice of the Joint Motion.

24. Following dismissal of the Chapter 11 Cases, the Debtors request authority to take such actions as are necessary or appropriate to wind up and/or dissolve as corporate entities under applicable state law.

APPLICABLE AUTHORITY

A. The Settlement Agreement Should Be Approved As It Is In The Best Interest Of The Estates And All Parties In Interest

25. This Court has the authority to grant the relief requested in this Joint Motion in the form of approval of the Settlement Agreement pursuant to section 105 of the Bankruptcy Code and Bankruptcy Rule 9019. Section 105(a) of the Bankruptcy Code provides that "[t]he court may issue any order ... that is necessary or appropriate to carry out the provisions of this title." Bankruptcy Rule 9019 grants the Court authority to approve settlements of claims and controversies after notice and a hearing.[7] Under this authority, the Third Circuit has emphasized that "to minimize litigation and expedite the administration of a bankruptcy estate, '[c]ompromises are favored in bankruptcy.'" *Myers v. Martin (In re Martin)*, 91 F. 3d 389, 393 (3d Cir. 1966) (quoting 9 Collier on Bankruptcy 9019.03[1] (15th ed. 1993)).

26. Before approving a settlement under Bankruptcy Rule 9019, a court must determine whether "the compromise is fair, reasonable, and in the interests of the estate." *In re Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (quoting *in re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)). To reach such a determination, the Court must assess the value of the claim that is being settled and balance it against the value to the estate of the approval of the settlement.

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[7] Bankruptcy Rule 9019 provides in pertinent part that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."

Martin, 91 F.3d at 393. In striking this balance, the Court should consider the following factors:

(a) The probability of success in the litigation;
(b) The complexity, expense and likely duration of the litigation;
(c) The possibilities of collecting on any judgment which might be obtained;
(d) All other factors relevant to making a full and fair assessment of the wisdom of the proposed compromise; and
(e) Whether the proposed compromise is fair and equitable to the debtors, their creditors, and other parties in interest.

Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-425 (1968); *see also*, *Martin*, 91 F.3d at 393. Basic to the process of evaluating proposed settlements is "the need to compare the terms of the compromise with the likely rewards of litigation." *TMT Trailer Ferry*, 390 U.S. at 425. The *TMT* rule does not require the Court to hold a full evidentiary hearing before a compromise can be approved, rather, the Court's obligation is "to canvass the issues and see whether the settlement 'falls below the lowest point in a range of reasonableness.'" 10 Collier on Bankruptcy, ¶ 9019.2, 9019.4 (16th ed. 2011) (quoting *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493 (Bankr. S.D.N.Y. 1991)). *See also*, *Cosoff v. Rodman (In re WT Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. Denied* 464 U.S. 822 (1983).

27. Applying these standards to this case, the Debtors and the Committee believe that the Settlement is in the best interest of the Debtors' estates and its creditors and is fair and equitable. The Debtors and the Committee believe it is in the best interest of the

estates and its creditors to resolve the Adversary Proceeding in this manner given the amounts at issue and the expense of pursuing CIT and Sun in the Adversary Proceeding. Absent this settlement, the Committee would be required to litigate against CIT and Sun, which would consume all assets in the Debtors' estates, and lead to an uncertain outcome given the potential defenses available to CIT and Sun. Moreover, even if the Committee completely prevailed, the potential delay in obtaining a final judgment against CIT and Sun could impair administration of the Debtors' estates in a timely fashion.

28. The Settlement results in the payment to the Debtors of the sum of $2,000,000.00 for the benefit of the estates plus the transfer to a trust for the benefit of the unsecured creditors of property belonging to Sun worth approximately $2,000,000.00. For this reason, in addition to the defenses and claims and counterclaims of CIT and Sun, it is respectfully submitted that the settlement falls well within the "range of reasonableness" the Court is required to consider. Accordingly, for the reasons set forth herein, it is respectfully requested that this Motion be granted.

B. The Court Should Approve the Dismissal of the Chapter 11 Cases

29. The Court should approve the Debtors' proposed procedures for distributions under the Settlement Agreement and for dismissal of these Chapter 11 Cases because, among other things, (a) the Debtors cannot bear the administrative costs of formulating and confirming a plan of reorganization, (b) the Debtors have no remaining estate assets to administer, (c) the proposed procedures provide the most efficient way to distribute the funds under the Settlement Agreement,

and (d) the proposed procedures provide for a reasonable and appropriate method for payment of outstanding administrative fees and expenses, including those of Professionals.

30. Under section 1112(b) of the Bankruptcy Code, a court may dismiss a debtor's chapter 11 case for "cause." 11 U.S.C. § 1112(b); *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984); *In re Blunt*, 236 B.R. 861, 864 (Bankr. M.D. Fla. 1999). Section 1112(b)(1) of the Bankruptcy Code states, in pertinent part:

> [O]n request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

11 U.S.C. § 1112(b)(1). A determination of cause is made by the Court on a case-by-case basis. *See Albany Partners*, 749 F.2d at 674. In addition, the decision to dismiss a case is particularly committed to the bankruptcy court's sound discretion. *See In re Camden Ordinance Mfg. Co. of Ark., Inc.*, 1999 WL 587790, at *2 (Bankr. E.D. Pa. July 21, 1999) (citing *In re Atlas Supply Corp.*, 857 F.2d 1061, 1063 (5th Cir. 1988)). As a result, the Court is authorized to dismiss the Debtors' Chapter 11 Cases upon a showing of cause.

31. The legislative history of section 1112(b) of the Bankruptcy Code and relevant case authority indicate that a court has wide discretion to use its equitable pow-

ers in disposing of a debtor's case. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 405 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 117 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5903; *see also In re Preferred Door Co.*, 990 F.2d 547, 549 (10th Cir. 1993) (stating that a court has broad discretion to dismiss a bankruptcy case); *In re Sullivan Cent. Plaza I, Ltd.*, 935 F.2d 723, 728 (5th Cir. 1991) (stating that a determination of whether cause exists under section 1112(b) of the Bankruptcy Code "rests in the sound discretion" of the bankruptcy court); *In re Koerner*, 800 F.2d 1358, 1367 & n.7 (5th Cir. 1986) (stating that a bankruptcy court is afforded "wide discretion" under section 1112(b) of the Bankruptcy Code); *Albany Partners*, 749 F.2d at 674 (same).

32. Section 1112(b) of the Bankruptcy Code provides a nonexclusive list of sixteen grounds for dismissal of a chapter 11 case. 11 U.S.C. § 1112(b)(4)(A)-(P); *Frieouf v. U.S.*, 938 F.2d 1099, 1102 (10th Cir. 1991) (stating that the list in section 1112(b) of the Bankruptcy Code is non-exhaustive); *Blunt*, 236 B.R. at 864 (same); *In re Camden Ordinance Mfg. Co. of Ark., Inc.*, 245 B.R. 794, 799 (E.D. Pa. 2000) ("[T]he bankruptcy court may find 'cause' for conversion or dismissal for reasons beyond the enumerated examples in § 1112(b)"). One example of cause is where there is a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). Similarly, cause exists where there is a failure to file or confirm a plan within the time fixed by the Bankruptcy Code or by order of the court. 11 U.S.C. § 1112(b)(4)(J). The inability to effectuate substantial consummation of a confirmed plan constitutes another form of cause warranting dismissal. 11 U.S.C. § 1112(b)(4)(M).

33. Dismissal of the Debtors' Chapter 11 Cases is appropriate under the circumstances because the Debtors are unable to confirm or to effectuate a plan. Inability to effectuate a plan arises when a debtor lacks the capacity to "formulate a plan or carry one out" or where the "core" for a workable plan of reorganization "does not exist." *See Preferred Door*, 990 F.2d at 549 (quoting *Hall v. Vance*, 887 F.2d 1041, 1044 (10th Cir. 1989)) (finding an "[i]nability to effectuate a plan arises where debtor lacks the capacity to 'formulate a plan or carry one out'"); *Blunt*, 236 B.R. at 865 (finding cause to dismiss debtor's case under section 1112(b) of the Bankruptcy Code where "core" for a workable plan of reorganization found to be nonexistent).

34. In these Chapter 11 Cases, it is not realistic or even possible for the Debtors to confirm a Chapter 11 plan. The Debtors have sold virtually all of their assets, liquidated the balance of their assets, resolved all pending litigation that would result in a recovery to the Debtors' estates and any remaining assets are designated for specific administrative claims or constitute the proceeds of the collateral of Sun and/or the Lender Group. There is no business to reorganize. There is no prospect of distributions to unsecured creditors, other than from the funds under the Settlement Agreement. Accordingly, cause clearly exists to dismiss the Debtors' Chapter 11 Cases under sections 1112(b)(4)(J) and (b)(4)(M) of the Bankruptcy Code due to the Debtors' inability to propose, much less effectuate, a plan.

35. In addition, if the Debtors' Chapter 11 Cases are not promptly dismissed, the Debtors will continue to incur unnecessary administrative expenses, creating substantial or continuing losses, as referenced in the first element of section 1112(b)(4)(A) of the Bankruptcy Code. The Debtors no longer have any businesses to

operate, and they are beyond rehabilitation, meeting the second element of cause under section 1112(b)(4)(A). As a result, the Debtors also have met their burden of proof to show that cause exists to dismiss the Debtors' Chapter 11 Cases under section 1112(b)(4)(A) of the Bankruptcy Code.

36. Once a court determines that cause exists to dismiss , the court must also evaluate whether dismissal is in the best interests of creditors and the estate. *See In re Superior Sliding & Window, Inc.*, 14 F.3d 240, 243 (4th Cir. 1994); *In re Mazzocone*, 183 B.R. 402, 411 (Bankr. E.D. Pa. 1995), *aff'd*, 200 B.R. 568 (E.D. Pa. 1996); *In re Warner*, 83 B.R. 807, 809 (Bank. M.D. Fla. 1988). Numerous factors demonstrate that dismissal of these Cases is in the best interests of the Debtors' creditors and estates.

37. Dismissal of a Debtor's Chapter 11 Cases is in the best interests of creditors where a debtor has nothing left to reorganize and the debtor's assets are fixed and liquidated. *See In re BTS, Inc.*, 247 B.R. 301, 310 (Bankr. N.D. Okla. 2000); *Camden Ordinance*, 245 B.R. at 799 (finding that a reorganization to salvage a business which ceased doing business was not feasible); *In re Brogdon Inv. Co.*, 22 B.R. 546, 549 (Bankr. N.D. Ga. 1982) (dismissing chapter 11 case in part where there was "simply nothing to reorganize" and no reason to continue the reorganization). As explained above, the Debtors have nothing left to reorganize, as essentially all of the Debtors' assets have been liquidated to cash. The only remaining tangible asset in the estates is cash subject to Sun's liens, and the claims in the Adversary Proceeding, which are being dismissed pursuant to the Settlement Agreement. Thus, the only significant remaining tasks are the reconciliation and payment of allowed administrative expenses claims, to be paid on a

final basis with the funds designated for such purpose, and the reconciliation of any remaining disputed general unsecured claims. Once these tasks are completed, the Chapter 11 Cases will be ripe for dismissal as there is no other action needed to administer these estates..

38. The funds to be distributed to the Trust and to pay administrative claims are not property of the Debtors' estates, as they constitute Sun's collateral,[8] which pursuant to the Settlement Agreement, are to be specifically carved out and assigned to the Trust for distribution after the Chapter 11 Cases are dismissed to holders of allowed general unsecured claims, a process for which there is ample precedent. *See, e.g., In re SPM Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993) (holding that a secured creditor may share proceeds to which it is otherwise entitled with unsecured creditors); *In re TSIC, Inc.*, 393 B.R. 71, 75-77 (approving the transfer of non-estate funds to a junior class of creditors outside of a plan in connection with the settlement of certain objections to the sale of assets); *In re World Health Alternatives, Inc.*, 344 B.R. 291 (Bankr. D. Del. 2006) (permitting a secured lender to carve out funds from its collateral for the benefit of unsecured creditors in exchange for committee's withdrawal of its objection to motion to sell substantially all of the debtor's assets); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001) (holding that secured lender's distribution to management did not preclude confirmation of the plan). Thus, dismissal of the Debtors' Chapter 11 Cases is in the best interest of creditors because the

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[8] In addition to its lien arising from payment on its $2 million guaranty and its subrogation rights, Sun also was granted a replacement lien on all of the Debtors' assets as adequate protection in a series of cash collateral stipulations so ordered by the Court.

Debtors' have no ongoing business operations, and the terms and conditions of the contemplated dismissal will result in the payment of all allowed administrative claims notwithstanding the administrative insolvency of the estates, as well as a modest distribution to holders of allowed general unsecured claims from the funds assigned by Sun to the Trust.

39. Additionally, dismissal of these Chapter 11 Cases is warranted because the apparent alternative—conversion to chapter 7—would not serve the best interests of the Debtors' creditors and estates for the reasons discussed herein. One focus of the test regarding the best interests of creditors is upon whether the economic value of the estate is greater inside or outside of bankruptcy. *See In re Clark*, 1995 WL 495951, at *5 (N.D. Ill. Aug. 17, 1995); *In re Staff Inv. Co.*46 B.R. 256, 261 (Bankr. E.D. Cal. 1993). The prime criterion for assessing the best interests of the estate is the maximization of value as an economic enterprise. *See id.*

40. Under the circumstances presented, conversion to chapter 7 and appointment of a chapter 7 trustee would impose significant and unnecessary additional administrative costs upon the Debtors' estates with no correlative benefit. There are no assets for a potential chapter 7 trustee to administer, and all avoidance actions have been settled or adjudicated. There would be no benefit to (and indeed only a burden upon) the Debtors' creditors and estates by conversion to cases under Chapter 7.

41. Furthermore, where creditors agree that dismissal is the proper disposition of the case, the test regarding the best interests of creditors is met. *See Camden Ordinance*, 245 B.R. at 798; *Mazzocone*, 183 B.R. at 411-12. This Motion and the Settlement Agree-

ment represent the Debtors' best efforts at reaching a solution that benefits all of their creditors within the confines of the Bankruptcy Code. The Debtors have formulated this Joint Motion in consultation with counsel for the Committee, and the Committee supports the approval of the Joint Motion. Dismissal of the Debtors' Chapter 11 Cases will curtail the unnecessary incurrence of additional administrative costs, further the Bankruptcy Code's goal of efficient administration of the Debtors' estates, and is in the best interests of creditors.

42. Finally, with respect to the payment of the Allowed Administrative Expense Claims, which include, *inter alia*, 503(b)(9) claims, Admin Taxes and Professionals Fees incurred in connection with these Chapter 11 Cases, it is well-settled that determinations concerning the payment of administrative expenses outside of a plan of reorganization are matters within the sound discretion of the bankruptcy court. *See In re HQ Global Holdings, Inc.*, 282 B.R. 169, 173 (Bankr. D. Del. 2002); *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1374 (11th Cir. 1994); *In re Verco Indus.*, 20 B.R. 664, 665 (B.A.P. 9th Cir. 1982); *In re Baptist Med. Ctr. of N.Y., Inc.*, 52 B.R. 417, 421 (E.D.N.Y. 1985). One of the chief factors courts consider in making this determination is bankruptcy's goal of an orderly distribution among creditors and the need to prevent a race to the debtor's assets. *See HQ Global Holdings*, 282 B.R. at 173. The Debtors' proposed mechanism for allowing and paying Allowed Administrative Expense Claims on a final basis meets this goal and provides a reasonable and efficient method for addressing such claims, given that the Debtors do not have the ability to confirm and implement a plan of reorganization.

43. Numerous courts, both in this district and throughout the country, have approved structured dismissals under similar circumstances to the Debtors' cases where the debtor lacks the requisite ability to confirm a Chapter 11 plan and/or the costs associated with plan confirmation would eliminate the possibility of a meaningful creditor recovery. *See, e.g., International Garden Products, Inc., et al.*, Case No. 10-13207 (KJC), Docket No. 541 (Bankr. D. Del. 2010); *In re KB Toys, Inc., a Delaware corporation, et. al.*, Case No. 08-13269 (KJC), Docket No. 914 (Bankr. D. Del. 2009); *In re CFM U.S. Corp., et al.*, Case No. 08-10668 (KJC), Docket No. 1097 (Bankr. D. Del. 2009); *In re Wickes Holdings, LLC, et al.*, Case No. 08-10212 (KJC), Docket No. 1418 (Bankr. D. Del. 2009); *In re Bag Liquidation, Ltd.*, Case No. 08-32096 (SGJ), Docket No. 688 (Bank. N.D. Tex. 2009); *In re Princeton Ski Shop, Inc., et al.*, Case No. 07-26206 (MS), Docket No. 546 (Bankr. D. N.J. 2008); *In re Harvey Elecs., Inc.*, Case No. 07-14051 (ALG), Docket No. 177 (Bankr. S.D.N.Y. 2008); *In re Dawahare's of Lexington, LLC*, Case No. 08-51381 (JMS), Docket No. 316 (Bankr. E.D. Ky. 2008); *In re New Weathervane Retail Corp.*, 04-11649 (PJW), Docket No. 566 (Bankr. D. Del. 2005); *In re Blades Board & Skate, LLC*, Case No. 03-48818 (NLW), Docket No. 126 (Bankr. D. N.J. 2004).

44. As of the Petition Date the Debtors ceased doing business and during the course of their Chapter 11 Cases liquidated all of their assets and, subject to the approval of the Settlement Agreement, have resolved all the estates claims other than a suit styled *Casimir Czyzewski, Jeffrey Oehlers, et al. v. Jevic Transportation, Inc., et al.*, (Adv. Pro. No. 08-50662) filed by certain former employees (the "*WARN Act Claimants*") as a putative class action in this Court against the

Debtors and Sun (the "*WARN Act Claim*"). Notably, nothing in the Settlement Agreement or the Settlement and Dismissal Order will effect a release of WARN Act Claimants against Sun, which they are free to prosecute in this Court or any other court of competent jurisdiction. Indeed, the dismissal of the Chapter 11 Cases will not necessarily deprive this court of jurisdiction to resolve the WARN Act Claim. *Porges v. Gruntal & Co., Inc. (In re Porges)*, 44 F.3d 159, 162-63 (2nd Cir. 1995) ("holding that the dismissal of an underlying bankruptcy case does not automatically strip a federal court of jurisdiction over an adversary proceeding which was related to the bankruptcy case at the time of its commencement.").

45. But for the Settlement Agreement the Debtors' estates are administratively insolvent and would not be able to pay their administrative claims in full. The Debtors believe that approval of the Settlement Agreement will provide the Debtors' estates with sufficient funds to pay their Allowed Administrative Expense Claims in full.

46. The Debtors lack sufficient funds to formulate, confirm, or effectuate a chapter 11 plan that meets the requirements of section 1129 of the Bankruptcy Code. Moreover, even if the Debtors were able to propose a liquidating or other chapter 11 plan, the cost of drafting, soliciting acceptances to, and attempting to confirm a chapter 11 plan would consume all the assets in the Debtors' estates and provide for no distribution to creditors.

47. Conversion of these Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code is not likely to yield any recovery to the Debtors' creditors or result in

any additional benefit to the Debtors' estates or creditors than what they will realize from dismissal.

48. Dismissing these Chapter 11 Cases in accordance with the procedures herein is in the best interest of the Debtors, their estates, creditors, and parties-in-interest.

49. Upon the filing of the Certification, attached hereto as *Exhibit E*, cause (as such term is defined in section 1112(b) of the Bankruptcy Code) will exist to dismiss these chapter 11 cases.

50. Cause exists to modify the effects of section 349(b) of the Bankruptcy Code so that all orders entered in these Chapter 11 Cases, including this order, prior to the date of dismissal shall remain in full force and effect for purposes of *res judicata* and otherwise, notwithstanding section 349(b) of the Bankruptcy Code, and section 349 of the Bankruptcy Code shall be of no force and effect.

51. No reinstatement or revesting of assets of the Debtors or their estates under section 349(b) of the Bankruptcy Code shall occur upon the entry of the dismissal order or the dismissal of the Chapter 11 Cases.

NOTICE

52. Notice of and a copy of this Joint Motion has been given to (a) the United States Trustee, and (b) those parties who have requested special notice pursuant to Bankruptcy Rule 2002. Solely the Notice of the Joint Motion, which sets forth the means to obtain a full copy of the Joint Motion, has been given to the parties on the Debtors' creditor matrix. The Parties submit that the foregoing notice is sufficient for entry of an Order on the Motion.

CONCLUSION

WHEREFORE, the Parties respectfully pray that the court enter an order substantially in the form of the proposed Settlement and Dismissal Order attached hereto as *Exhibit B* and (ii) grant the Parties such other and further relief as is just.

* * *

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Settlement Agreement") is entered into as of this 22nd day of June, 2012, by and among Jevic Holding Corp. ("JHC"), Jevic Transportation, Inc. ("Jevic") and Creek Road Properties, LLC ("Creek Road"), as debtors in possession in the Chapter 11 Cases (as defined below) (collectively the "Debtors"); the Official Committee of Unsecured Creditors (the "Committee"); Sun Capital Partners IV, LP, Sun Capital Partners Management IV, LLC, and Sun Capital Partners, Inc. (collectively "Sun"); and The CIT Group/Business Credit, Inc., as Agent ("CIT") for the lenders (the "Lender Group") under the loan facilities described in the complaint filed in the Adversary Proceeding as defined below (each a "Party" and collectively, the "Parties").

WHEREAS, on May 20, 2008 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), which cases are jointly administered under Case Nos. 08-11006 (BLS) (the "Chapter 11 Cases"); and

WHEREAS, the Debtors continue to operate their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code, and no trustee or examiner has been appointed in the Chapter 11 Cases; and

WHEREAS, on June 4, 2008, the United States Trustee appointed the Committee pursuant to section 1102 of the Bankruptcy Code; and

WHEREAS, pursuant to the Final Order (i) Authorizing Debtors-in-Possession to Obtain Senior Debtor in Possession Financing; (ii) Granting Liens, Security Interest, and Super Priority Status; (iii) Authorizing Use of Cash Collateral; and (iv) Affording Adequate Protection to Prepetition Lenders (the "Final DIP Financing Order") [Docket No. 118] entered in the Chapter 11 Cases on June 20, 2008, the Committee was granted standing as set forth in the Order;

WHEREAS, pursuant to the Final DIP Financing Order, on December 31, 2008, the Committee commenced Adversary Proceeding No. 08-51903 (BLS) (the "Adversary Proceeding") against CIT asserting various claims and an objection to the allowance of CIT's claims in the Chapter 11 Case; and

WHEREAS, by Stipulation dated February 20, 2009, which was So Ordered by the Court on February 27, 2009 [Docket No. 434], the Committee was granted standing to assert all of the other estate claims arising out of the facts and circumstances alleged in the complaint filed in the Adversary Proceeding, including all estate claims against Sun; and

WHEREAS, on June 30, 2010, the Committee amended the complaint in the Adversary Proceeding to add Sun as defendants, and following a ruling by the Court on CIT's motion to dismiss the complaint rendered on September 15, 2011, the Committee filed a second amended complaint against CIT and Sun on October 7, 2011; and

WHEREAS, CIT and Sun filed answers to the second amended complaint in which they denied liability with respect to the claims asserted against them in the Adversary Proceeding and asserted affirmative defenses, and CIT has asserted a Counterclaim (the

"Counterclaim") against the Committee which the Committee denied; and

WHEREAS, in order to avoid the expense, burden and risk of litigation, and to bring about an orderly and efficient conclusion to the Chapter 11 Cases, the Parties desire and intend to effect a final settlement and resolution of the Adversary Proceeding and all existing and potential claims that have been made or could have made by any Party to the Adversary Proceeding against the other and provide for the dismissal of the Adversary Proceeding and the Chapter 11 Cases; and

WHEREAS, the Debtors join in this Settlement Agreement to evidence their consent to and agreement to implement the terms and provisions of Settlement Agreement, including the granting of releases, payment of allowed and unpaid Administrative claims, the reconciliation of secured, Administrative, and unsecured claims, and the dismissal of the Chapter 11 Cases.

NOW THEREFORE, in consideration of the foregoing and the mutual promises and covenants set forth herein, and other good and valuable consideration, the adequacy and receipt of which the Parties hereby acknowledge, the Parties do hereby agree, subject to the approval of the Bankruptcy Court, as follows:

1. Promptly upon the execution of this Settlement Agreement, the Parties shall file a joint motion (the "Joint Motion") with the Bankruptcy Court seeking entry of an order (the "Settlement Order") approving this Settlement Agreement pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and dismissing the Chapter 11 Cases pursuant to section 1112(b) of the Bankruptcy Code, substantially in the form of *Exhibit 1* to this Settlement Agreement.

2. Within ten (10) business days after the Effective Date, as defined in paragraph 18 of this Settlement Agreement, the following shall occur simultaneously:

(a) CIT shall pay to the Debtors for the benefit of their estates the sum of $2,000,000 (the "Administrative Claim Fund");

(b) the Committee, CIT and Sun shall submit to the Bankruptcy Court a stipulation dismissing the Adversary Proceeding with prejudice, substantially in the form of *Exhibit 2* to this Settlement Agreement;

(c) the following releases, which shall be included in the Settlement Order, shall become effective upon payment of the Administrative Claim Fund to the Debtor as provided in paragraph 2(a) hereof without the need for additional documentation or the entry of any additional orders, except as expressly provided in this Settlement Agreement:

(i) *The Release of Sun*

The Debtors, their estates, the Committee, and each of their past, present, and future agents, representatives, administrators, successors, and assigns, including any Chapter 7 Trustee or any Chapter 11 Trustee subsequently appointed and any entity acting on his or her behalf (collectively the "Estate Releasing Parties") hereby grant a full, complete, and unconditional release and forever discharge Sun and each of its respective past, present, and future employees, stockholders, officers, directors, partners, agents, brokers, contractors, servants, affiliates, subsidiaries, parents,

departments, divisions, insurers, attorneys, predecessors, successors and assigns (collectively, the "Sun Released Parties"), and each of them, jointly and severally, from any and all claims or counterclaims, causes of action, remedies, damages, liabilities, debts, suits, demands, actions, costs, expenses, fees, controversies, set-offs, third party actions or proceedings relating in any way to, or arising from any transaction with or in connection to, the Debtors or their estates of whatever kind or nature, whether at law, equity, administrative, arbitration or otherwise, whether known or unknown, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, which any of the Estate Releasing Parties may now have, have ever had, or in the future have, as of the Effective Date against any and each of the Sun Released Parties, without exception or limitation, including, without limitation, any and all claims asserted in or which could have been asserted in, or which related to the subject matter of the Adversary Proceeding, or which are based on any avoidance or other powers afforded the Estate Releasing Parties under the Bankruptcy Code, except for Sun's obligations under this Settlement Agreement.

(ii) *The Release of The CIT Group/Business Credit, Inc., Individually and as Agent*

The Estate Releasing Parties hereby grant a full, complete, and unconditional release and forever discharge The CIT Group/Business Credit, Inc., individually

and as Agent and each of its respective past, present, and future employees, stockholders, officers, directors, partners, agents, brokers, contractors, servants, affiliates, subsidiaries, parents, departments, divisions, insurers, attorneys, predecessors, successors and assigns (collectively, the "CIT Released Parties"), and each of them, jointly and severally, from any and all claims or counterclaims, causes of action, remedies, damages, liabilities, debts, suits, demands, actions, costs, expenses, fees, controversies, set-offs, third party actions or proceedings relating in any way to, or arising from any transaction with or in connection to, the Debtors or their estates of whatever kind or nature, whether at law, equity, administrative, arbitration or otherwise, whether known or unknown, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, which any of the Estate Releasing Parties may now have, have ever had, or in the future have, as of the Effective Date against any and each of the CIT Released Parties, without exception or limitation, including, without limitation, any and all claims asserted in or which could have been asserted in, or which related to the subject matter of the Adversary Proceeding, or which are based on any avoidance or other powers afforded the Estate Releasing Parties under the Bankruptcy Code, except for CIT's obligations under this Settlement Agreement.

(iii) *Sun Release of The Debtors, the Estates and the Committee*

Sun on behalf of each of its respective past, present, and future employees, stockholders, officers, directors, partners, agents, brokers, contractors, servants, affiliates, subsidiaries, parents, departments, divisions, insurers, attorneys, predecessors, successors and assigns (collectively the "*Sun Releasing Parties*") hereby grant a full, complete, and unconditional release and forever discharge the Estate Releasing Parties from any and all claims or counterclaims, causes of action, remedies, damages, liabilities, debts, suits, demands, actions, costs, expenses, fees, controversies, set-offs, third party actions or proceedings relating in any way to, or arising from any transaction with or in connection to, the Debtors or their estates of whatever kind or nature, whether at law, equity, administrative, arbitration or otherwise, whether known or unknown, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, which the Sun Releasing Parties may now have, have ever had, or in the future have, as of the Effective Date, against any and each of the Estate Releasing Parties, without exception or limitation, including, without limitation, any and all claims asserted in or which could have been asserted in, or which related to the subject matter of the Adversary Proceeding or the Chapter 11 Cases, except (i) Sun's secured claim, the disposition of which shall be addressed pursuant to this Settlement Agreement and (ii) the Estate Releasing Parties' obligations under this Settlement Agreement.

(iv) *CIT Release of the Debtors, the Estates and the Committee*

The CIT Group/Business Credit, Inc., individually and as Agent and each of its respective past, present, and future employees, stockholders, officers, directors, partners, agents, brokers, contractors, servants, departments, divisions, insurers, attorneys, predecessors, successors and assigns (collectively, the "*CIT Releasing Parties*") hereby grant a full, complete, and unconditional release and forever discharge the Estate Releasing Parties from any and all claims or counterclaims, causes of action, remedies, damages, liabilities, debts, suits, demands, actions, costs, expenses, fees, controversies, set-offs, third party actions or proceedings relating in any way to, or arising from any transaction with or in connection to, the Debtors or their estates of whatever kind or nature, whether at law, equity, administrative, arbitration or otherwise, whether known or unknown, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, which the CIT Releasing Parties may now have, have ever had, or in the future have, as of the Effective Date, against any and each of the Estate Releasing Parties without exception or limitation, including without limitation, any and all claims asserted in or which could have been asserted in, or which related to the subject matter of the Adversary Proceeding or the Chapter 11 Cases, except for the Estate Releasing Parties' obligations under this Settlement Agreement.

; and

(d) The Estate Releasing Parties shall execute and deliver to CIT releases in favor of the other members of the Lender Group in the form attached as *Exhibit 3* hereto, and such releases shall be effective as of the same date as the releases in Section 2(c) of this Settlement Agreement without the need for any additional documentation or the entry of any additional orders.

3. The Settlement Order shall fix and determine that Sun has an allowed secured claim secured by a superpriority lien and security interest in the cash and other assets of the Debtors' estates in an amount equal to $2,000,000, plus at least $200,000 of accrued and unpaid interest as of May 31, 2012 and at least $250,000 in fees and costs incurred as of May 31, 2012.

4. The Settlement Order shall provide for the dismissal of the Debtors' Chapter 11 Cases upon the filing of the notice provided in paragraph 8 hereof.

5. Upon payment of the Administrative Claim Fund to the Debtors, the Debtors shall pay the aggregate sum of $200,000 from the Administrative Claim Fund to the professionals retained by the Committee on account of previously approved and unpaid fees and expenses.

6. Unless a later date is agreed to by the Debtors, Sun, and the Committee, within sixty (60) days following Effective Date, the Debtors shall determine (a) in consultation with the Committee and Sun, the identity of the holders and the amount of the allowed chapter 11 administrative claims, including statutory fees payable to the United States Trustee through the date of dismissal (the "*Administrative Claims*") and (b) in consultation with the Committee, the identity of the holders and the amount of allowed general unsecured claims.

7. Upon reconciliation of the Administrative Claims, as set forth in paragraph 6 hereof, the Debtors shall pay in full the allowed Administrative Claims. Upon payment in full of the allowed Administrative Claims as provided herein, Sun shall indefeasibly transfer to a liquidating trust established by the Debtors as grantor for the exclusive benefit of the Debtors' general unsecured creditors (the "*Trust*"), as a collateral carve-out from its allowed secured claim and superpriority liens on the assets in the Debtors' estates, a sum equal to all of the remaining funds in the estates (the "*Carve-out*"). The Trust shall be responsible for paying the allowed general unsecured claimants their pro rata share of the Carve-out.

8. Upon payment in full of the allowed Administrative Claims and after the completion of the transfer of the Carve-out to the Trust, the Debtor and the Committee, by counsel, shall file a certification substantially in the form of *Exhibit 4* attached hereto with the Bankruptcy Court that all allowed Administrative Claims have been paid in full and the Carve-out has been transferred to the Trust, and thereupon, in accordance with the Settlement Order, the Debtors' Chapter 11 Cases shall be dismissed without the need for a further order of the Bankruptcy Court.

9. Each Party shall bear its own costs and expenses in connection with the Adversary Proceeding and this Settlement.

10. CIT and Sun expressly deny any liability in connection with the claims the Committee has made, and this Settlement Agreement and the performance provided by any Party under this Settlement Agreement is not and shall not be construed as an admission by any Party of any wrongful action or violation of any

federal or state statutory or common law rights, or any other possible or claimed violation of law or rights. The Parties have entered into this Settlement Agreement solely for the purpose of compromise and amicable settlement, and the settlement should not be construed as an admission of liability by anyone.

11. The Parties expressly represent and warrant that this Settlement Agreement is given in good faith and acknowledge that execution of this Settlement Agreement is not the product or result of any duress, economic or otherwise.

12. The Parties represent and warrant that they have read and understand the terms of this Settlement Agreement.

13. The Parties represent and warrant that they have not assigned or otherwise transferred all or any part of their claims, demands, costs, expenses, liabilities, damages, actions or causes of action against the other party covered by the releases set forth in paragraph 2 above. The Parties agree to indemnify the other for any and all costs incurred as a result of any breach of this warranty, including, without limitation, court costs and reasonable attorneys' fees.

14. Each of the Parties represents and warrants that each individual signing the Settlement Agreement on behalf of such Party is fully authorized to sign on behalf of said Party and to release the claims to be released by such Party under this Settlement Agreement, except in the Debtors' case to the extent that Bankruptcy Court approval is required. Each individual signing on behalf of a Party or Parties has the power and authority to enter into this Settlement Agreement on behalf of the Party or Parties on whose behalf he or she has signed.

15. The Parties hereby irrevocably consent to the jurisdiction of the Bankruptcy Court with respect to any action to enforce the terms and provisions of this Settlement Agreement and expressly waive any right to commence any such action in any other forum.

16. This Settlement Agreement reflects the entire agreement and understanding between the Parties with respect to the subject matter of this Settlement Agreement. It is expressly understood and agreed that this Settlement Agreement may not be altered, amended, modified, or otherwise changed in any respect except by a writing executed by all Parties.

17. This Settlement Agreement shall become binding on the Parties upon its execution by all Parties. In the event the Bankruptcy Court declines to enter the Settlement Order approving this Settlement Agreement, or if the Settlement Order is entered and thereafter reversed by final order on appeal, then this Settlement Agreement shall become null and void.

18. The "Effective Date" as used herein shall be the business day following the date that the Settlement Order becomes a Final Order, unless otherwise agreed to by the Parties.

19. "Final Order" means an order or judgment of the Bankruptcy Court, as entered on the docket of the Bankruptcy Court, that has not been reversed, stayed, modified, or amended, as to which (a) the time to appeal, seek review or hearing, or petition for certiorari has expired and no timely filed appeal or petition for review, rehearing, remand, or certiorari is pending or (b) any appeal taken or petition for certiorari filed has been resolved by the highest court to which the order or judgment was appealed or from which certiorari was sought; *provided, however*, that the possibility that a

motion under Rule 59 or Rule 60 of the Bankruptcy Rules, or any analogous rule under the Bankruptcy Rules or other rules governing procedure in cases before the Bankruptcy Court, may be filed with respect to such order shall not cause such order not to be a Final Order.

20. The Parties shall execute and deliver such further instruments, documents, or papers and perform all acts necessary or proper to carry out and effectuate the terms of this Settlement Agreement.

21. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of New York without regard to its conflict of laws procedures.

22. The Parties agree that no breach of any provision hereof can be waived except in writing. The waiver of a breach of any provision hereof shall not be deemed a waiver of any other breach of any provision hereof.

23. Any and all notices required or permitted under this Settlement Agreement shall be in writing and shall be personally delivered or mailed by registered or certified mail, return receipt requested or by overnight delivery to the respective parties at the following addresses, unless and until a different address has been designated by written notice to the other parties:

* * *

24. The provisions of this agreement are non-severable.

25. Each Party has cooperated in the drafting and preparation of this Settlement Agreement. Hence, in any construction to be made of this Settlement Agreement, the same shall not be construed against any Party.

26. This Settlement Agreement may be executed in any number of identical counterparts, and each of such counterparts is to be deemed an original, for all purposes, but all counterparts shall collectively constitute one Settlement Agreement. Signatures by facsimile shall be deemed original signatures for all purposes.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 08-11006 (BLS)
(Jointly Administered)
Adv. Pro. No. 08-51903 (BLS)
Related to D.I. 1346 in Case No. 08-11006 and D.I 67 in Adv. Pro. No. 08-51903

October 23, 2012

IN RE JEVIC HOLDING CORPORATION, *et al.*,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ON BEHALF OF THE BANKRUPTCY ESTATES OF JEVIC HOLDING CORPORATION, *et al.*,
Plaintiff,

-against-

CIT GROUP/BUSINESS CREDIT, INC., IN ITS CAPACITY AS AGENT, SUN CAPITAL PARTNERS IV, LP, SUN CAPITAL PARTNERS MANAGEMENT IV, LLC, AND SUN CAPITAL PARTNERS, INC.,
Defendants.

SUPPLEMENT TO THE JOINT MOTION OF THE DEBTORS, CIT, SUN CAPITAL AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 105(a), 349 AND 1112(b) AND FED. R. BANKR. P. 9019 FOR ENTRY OF AN ORDER: (I) APPROVING SETTLEMENT AGREEMENT AND RELEASING CLAIMS; (II) DISMISSING THE DEBTORS'

CASES UPON IMPLEMENTATION OF SETTLEMENT; AND (III) GRANTING RELATED RELIEF

Jevic Holding Corp. ("*JHC*"), Jevic Transportation Inc. ("*Jevic*") and Creek Road Properties LLC ("*Creek Road*") (collectively the "*Debtors*"), The Official Committee of Unsecured Creditors (the "*Committee*"), Sun Capital Partners IV, LP, Sun Partners Management IV, LLC and Sun Capital Partners, Inc. (collectively, "*Sun*"); and The CIT Group/Business Credit, Inc. as agent ("*CIT*") for the lenders (the "*Lender Group*") under the loan facilities described in the complaint filed in the above-captioned Adversary Proceeding (all hereinafter referred to in this Supplement to Joint Motion as a "*Party*" or collectively, the "*Parties*"), by and through their respective undersigned counsel, hereby file this *Supplement to the Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* (the "*Supplement*") seeking entry of an order, as modified herein from the order previously submitted with the Joint Motion (the "*Settlement and Dismissal Order*") (i) approving the Settlement Agreement[1] entered into between and among the Par-

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[1] Initially capitalized terms used herein and not otherwise defined herein shall have the same meaning as set forth in the *Joint Motion of the Debtors, CIT, Sun Capital, and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a). 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settle-*

ties, (ii) dismissing the Debtors' Chapter 11 Cases upon implementation of the Settlement Agreement; and (iii) granting related relief. In further support of the Joint Motion (which is fully incorporated herein by reference), the Parties respectfully state the following:

THE SETTLEMENT AGREEMENT & JOINT MOTION

1. The Joint Motion was filed in order to resolve the Adversary Proceeding and bring these Chapter 11 Cases to an orderly conclusion. Pursuant to the Joint Motion, the Parties have agreed, subject to the Court's approval, to the terms and conditions of the Settlement Agreement which resolves all claims that the Parties may have against each other, and provides for (a) the exchange of releases, (b) the payment of $2,000,000 by CIT to the Debtors, which shall be used to satisfy unpaid chapter 11 allowed administrative claims, (c) the dismissal with prejudice of the Adversary Proceeding, (d) the reconciliation of administrative, general unsecured and certain priority claims during the sixty (60) day period following the "*Effective Date*" as that term is defined in the Settlement Agreement, (e) payment of the allowed administrative claims by the Debtors; (f) the assignment by Sun as a collateral carve out of its allowed secured claim and superpriority liens on the estates' remaining assets to a liquidating trust established by the Debtors as grantor, pursuant to the Settlement Agreement, and as provided in this Supplement, first, to pay agreed upon amounts to certain priority creditors, and second, to pay the balance on a pro rata basis to the Debtors' general unsecured creditors

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ment; and (III) Granting Related Relief [Bankruptcy Case Docket No. 1346; Adv. Pro. Docket No. 67] (the "*Joint Motion*").

(the "*Trust*"), and (g) thereafter, the dismissal of the Chapter 11 Cases.

2. The following objections were filed to the Joint Motion (collectively, the "*Objections*"): (a) United States Trustee [Docket No. 1389]; (b) Naysha Berrios, Individually and as Executrix of the Estate of Cassandra Berrios [Docket No. 1390]; (c) New York State Department of Taxation and Finance [Docket No. 1392]; (d) State of Ohio [Docket No. 1393]; (e) Cabarrus County Tax Collector [Docket No. 1394]; (e) Class Action WARN Plaintiffs [Docket No. 1396]; and (f) United States, on behalf of the Internal Revenue Service [Docket No. 1397].

3. The Debtors have reached out to the parties that filed Objections in an effort to resolve same. All Objections have been resolved except those of the United States Trustee and the WARN Plaintiffs, despite the efforts of the Debtors to resolve same.

RELIEF REQUESTED

4. By the Joint Motion and this Supplement, and to implement a resolution of many of the Objections filed with respect to the Joint Motion, the Parties seek entry of the Settlement and Dismissal Order, substantially in the form attached hereto as *Exhibit A*.

SUPPLEMENT TO JOINT MOTION

5. The Joint Motion is hereby supplemented to resolve the objections made by several taxing authorities and to provide for the treatment of certain priority claims filed against the Debtors under sections 507(a)(5) and (8) of the Bankruptcy Code, as more specifically identified in *Exhibit B* to this Supplement, (collectively, the "*Resolved Priority Claims*").

A. Proposed Procedures for Payment of Resolved Priority Claims

6. Presently, there are no unencumbered assets in the Debtors' estates. All the Debtors' assets, including their tangible assets and all avoidance actions (other than the claims asserted in the Adversary Proceeding) have been fully liquidated, and the only asset in the estate is cash in the approximate amount of $1.7 million, which is subject to Sun's liens. Accordingly, there are no available assets to pay outstanding administrative, priority or general unsecured claims at this time. Pursuant to this Supplement, provision will be made for the satisfaction in full of the compromised or otherwise allowed amounts of the Resolved Priority Claims in conjunction with dismissal of the Chapter 11 Cases.

7. Consistent with the Settlement and Dismissal Order, the Debtors and the Committee propose a streamlined and efficient method of making distributions on account of the Resolved Priority Claims as quickly and easily as possible after dismissal of the Chapter 11 Cases.

8. The Debtors have engaged in a process to resolve certain of the Resolved Priority Claims asserted against the Debtors and have reached a resolution of the allowed amounts of such Resolved Priority Claims.

9. Annexed as *Exhibit B* to this Supplement is a schedule (the "*Resolved Priority Claims Schedule*") [2] of the claims that represents the compromised or other-

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[2] The claims and amounts set forth on *Exhibit B* are subject to modification after any claims objection is resolved or adjudicated. A final version of *Exhibit B* will be filed with the Certification referenced in paragraph 22 of the Joint Motion and attached as *Exhibit E* to the Joint Motion.

wise allowed amount that the Debtors believe should constitute allowed priority claims under sections 507(a)(5) and (8) of the Bankruptcy Code against their estates (collectively, the "*Allowed Resolved Priority Claims*," and each individually, an "*Allowed Resolved Priority Claim*") for purposes of distribution under the Settlement Agreement, as supplemented herein.

10. The amounts set forth on the Resolved Priority Claims Schedule represent the Resolved Priority Claim amount set forth in the proof of claim filed by the creditor, if any, on or before the claims bar date for which an agreed claim amount and distribution percentage has been agreed, excluding duplicative proofs of claim and excluding claims for which an objection has been adjudicated. Upon dismissal of the Chapter 11 Cases, the Trust will make distributions to holders of Allowed Resolved Priority Claims and then to holders of Allowed GUC Claims on a pro rata basis.

B. Certification of Counsel and Request for Dismissal

11. After the completion of distributions to the Trust, and payment of Allowed Administrative Expense Claims as described in the Joint Motion as described above, the Debtors request that the Court dismiss these Chapter 11 Cases upon the filing of a certification of counsel substantially in the form of *Exhibit E* to the Joint Motion (the "*Certification*") with the Court by the Debtors and the Committee, at which time the Chapter 11 Cases will be dismissed without the need for a further Order of the Court. The Certification will be filed as soon as reasonably practicable following the completion of the satisfaction of all Allowed Administrative Expense Claims as described in the Joint Motion and transfer to the Trust of the remaining assets

for the payment of Allowed Resolved Priority Claims and Allowed GUC Claims as described above. Among other things, the Certification will verify (a) that all quarterly fees of the U.S. Trustee have been paid in full; (b) that all Allowed Administrative Expense Claims have been paid in full; (c) that all remaining funds in the estates, which are subject to Sun's lien, have been transferred to the Trust to pay the Allowed Resolved Priority Claims and make pro rata distributions to holders of Allowed GUC Claims after dismissal of the Chapter 11 Cases.

12. The Debtors intend to serve the Certification on the general service list established in these Chapter 11 Cases, including the U.S. Trustee, but will not send the Certification to the Debtors' entire matrix of creditors and parties-in-interest, as such parties have received reasonable notice of the proposed dismissal through service of the Joint Motion and/or the Notice of the Joint Motion.

13. Following dismissal of the Chapter 11 Cases, the Debtors request authority to take such actions as are necessary or appropriate to wind up and/or dissolve as corporate entities under applicable state law.

NOTICE

14. Notice of and a copy of this Supplement has been given to (a) the United States Trustee, and (b) those parties who have requested special notice pursuant to Bankruptcy Rule 2002. A copy of the Notice of the Supplement has been given to the parties on the Debtors' creditor matrix. The Parties submit that the foregoing notice is sufficient for entry of the Settlement and Dismissal Order on the Joint Motion and Supplement.

CONCLUSION

WHEREFORE, the Parties respectfully pray that the court enter an order substantially in the form of the proposed Settlement and Dismissal Order attached hereto as *Exhibit A* and (ii) grant the Parties such other and further relief as is just.

* * *

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

Case No. 08-11006 (BLS)

IN THE MATTER OF JEVIC HOLDING CORPORATION, *et al.*,
Debtors.

November 13, 2012

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* * *

THE COURT: Okay. Any objection to proceeding by proffer? There will obviously be a full opportunity for—for cross.

Okay. All right. You may proceed.

MR. PACITTI: Thank you, Your Honor.

It's not that long, but I should take a sip of water, Your Honor. I promise it's—

THE COURT: It's always—

MR. PACITTI: —really not that long.

THE COURT: It's always ominous when somebody—

(Laughter)

MR. PACITTI: It's just cold and flu season, Your Honor, and too many young daughters at home that are sick.

Your Honor, we would call to the stand Daniel Dooley. Mr. Dooley would testify that he is a principal of Morris, Anderson & Associated, Ltd and is the chief

restructuring officer of the debtors and has been since early May of 2008.

Mr. Dooley would testify that the debtors filed their bankruptcy petitions on May 20th, 2008 and that as of the petition date the debtors were borrowers under a secured credit agreement with CIT and the lender group, and that as of December 31, 2007 the debtors had $25.4 million of outstanding borrowings and $27.8 million of outstanding letters of credit for a total balance outstanding of $53.2 million under the pre-petition facility.

Mr. Dooley would also testify that in connection with the forbearance agreement entered into between the debtors and the lender group on January 8, 2008, a Sun Capital entity provided a $2 million limited guarantee of the pre-petition facility. He would also testify that prior to the petition date the Sun entity paid CIT in respect of that guarantee and, therefore, acquired a last out portion of the senior secured lenders claims against the debtors secured by substantially all of the debtors' assets.

Mr. Dooley would testify that immediately prior to the petition date the debtors commenced a wind down process pursuant to which they ceased substantially all of their operations and terminated substantially all of their employees.

Mr. Dooley would testify that the debtors paid all accrued and unpaid wages and benefits to the employees through the respective termination dates.

Mr. Dooley would testify that post-petition all of the debtors' tangible assets were liquidated and that the proceeds were used to repay outstanding obligations owed to the lender group under the pre-petition

facility which had been rolled up in the debtor-in-possession financing facility approved by the Court.

Mr. Dooley would also testify that the DIP facility included the debtors' waiver of any rights to challenge the liens and claims of the senior secured lenders.

He would also testify that after paying the civil lender group were made, there remained outstanding $2 million of principle amount plus continuing accruing interest, attorney's fees and costs to CIT, Sun as lender and the lender group.

He would testify that currently the total amount outstanding to the senior secured lenders inclusive of interest, fees and costs is approximately $4 million. The senior—he would also testify that the senior secured lenders have a first priority security interest in all the assets of the debtors, including avoidance actions and their proceeds. And, therefore, but for the carve-out of their lien positions, there would be no assets available to any creditors in these cases.

Mr. Dooley would testify that on May 23rd, 2008, certain former employees of the debtors initiated a class action suit against the debtors, Sun Capital Partners, Inc., and various John Doe's in the United States Bankruptcy Court in the District of Delaware under adversary number 08-50662, alleging violations of both the New Jersey and federal statutes concern—concerning employee terminations.

He would also testify that on May 27th, 2008, certain alleged former employees of the debtors initiated a class action suit against the debtors, Sun Capital Partners, Inc. and other named parties in the Superior Court of New Jersey, Burlington County Law Division,

under case number 08-3341, also alleging violations of New Jersey statutes concerning employee terminations.

He would testify that the New Jersey class action has been resolved and terminated.

Mr. Dooley would testify that pursuant to the final DIP financing order, the committee was granted standing to assert claims against the lender group and that pursuant to that order, on December 31, 2008, the committee commenced an adversary proceeding by filing a complaint against CIT, docket number 08-51903 asserting claims arising from Sun's acquisition of Jevic pursuant to a leveraged buyout.

The complaint was later amended on June 30, 2010 to add Sun parties as defendants. He would also testify that on September 15th, 2011, the committee filed a second amended complaint against CIT and Sun and—and to which Sun has filed responsive pleadings and CIT has filed responsive pleadings, including counterclaims against the committee.

He would testify that all assets of the estates, including the avoidance actions, have been monetized consisting of approximately $100—$1.7 million of senior secured lenders collateral proceeds and that there's no further work to be performed other than to defend the pending adversary by the WARN plaintiffs and to prosecute the committee adversary proceeding by the committee.

He would also testify that rather than litigate the claims in the committee's adversary proceedings, the parties commenced discussions in March 2012 regarding the terms under which the committee's adversary proceeding would be settled and the Chapter 11 cases disposed of. He would testify to this end that the par-

ties have reached a settlement, which is the subject of the joint 9019 motion today.

Mr. Dooley would testify that the material provisions of the settlement agreement are as follows:

Number one, a release of claims against each of the parties to the settlement agreement estimated to be approximately $4 million with respect to the claims and liens of CIT, the lender group, and Sun;

Number two, the payment of $2 million by CIT to the debtors which should be used to satisfy unpaid Chapter 11 allowed administrative claims;

Number three, the dismissal with prejudice of the committee's adversary proceeding;

Number four, the assignment by Sun of its liens on the estate's remaining assets of approximately $1.7 million in cash proceeds of collateral liquidations to a liquidating trust to be established by the debtors as grantor for the benefit of the debtors' general unsecured creditors and priority tax claims;

Number five, the reconciliation of administrative and general unsecured claims during a 60 day period following the effective date of the settlement agreement; and lastly, thereafter, the dismissal of the Chapter 11 cases.

Mr. Dooley would testify that the total general unsecured claims filed in this case currently total approximately $24 million. He would also testify that the debtors believe that all valid post-petition administrative expenses incurred in the ordinary course of the debtors' business have been paid, except for unpaid professional fees and expenses of professionals of the debtors and committee totaling approximately $1.7 million.

He would testify that the debtors believe that the only other valid unpaid administrative expense claims are timely submitted 503(b)(9) claims in the amount of $213,200, post-petition date administrative taxes in the amount of $78,297; and miscellaneous administrative claims in the amount of $79,259.

He would testify that the debtors have resolved certain priority claims substantially comprised of the taxing authority claims as recited previously in my presentation, Your Honor, and that these claims have agreed—these claimants have agreed to a reduction of their claims and a percentage payment pursuant to the settlement as supplemented and will be paid an aggregate amount of approximately $250,000.

Mr. Dooley would testify that under the settlement, effectively, all creditors will be paid in full or a compromised agreed amount other than the WARN plaintiffs. Additionally, the general unsecured creditors would receive a pro rata distribution from the trust.

Mr. Dooley would testify that the WARN plaintiffs have not filed a proof of claim on behalf of their WARN plaintiff clients; that the debtors are contesting the WARN Act liability asserted in the adversary proceeding filed by the WARN plaintiffs based on various potential affirmative defenses; and that despite numerous efforts by the debtors to include the WARN plaintiffs in this settlement, the debtors were unable to reach a resolution with the WARN plaintiffs.

Mr. Dooley would also testify that the recoveries to creditors contemplated by the settlement would come from a sharing in the senior secured lenders' property which are proceeds of a liquidation of their collateral.

Mr. Dooley would also testify that nothing in the proposed settlement would impact the rights of non-settling parties and that the WARN plaintiffs' adversary proceeding is not effected or intended to be effected by the proposed settlement.

Mr. Dooley would further testify that the request for dismissal of these cases was meant to acknowledge the realities of the situation of these cases; that is, namely, that a plan is not possible and that a conversion to a Chapter 7 would leave a trustee with the burden of the cost of the remaining litigation with no assets available and no prospect of assets since the assets of the estate have been fully monetized are—and are fully encumbered.

And, lastly, it is Mr. Dooley's testimony that in his view, given the circumstances of these cases, the settlement is the best possible and achievable results for the debtors.

Your Honor, that concludes the proffer of Mr. Dooley's testimony and—and he, of course, is available for cross-examination.

THE COURT: Okay. I assume we'll cross.

All right. Mr. Dooley. We'll swear the witness, please.

Please remain standing.

THE CLERK: Please raise your right hand.

(Witness sworn)

THE CLERK: Please state and spell your name for the record.

THE WITNESS: Sure. Daniel F. Dooley, D-O-O-L-E-Y.

THE COURT: Mr. Kenney, good afternoon.

MR. KENNEY: Good afternoon, Your Honor. For the record, Mark Kenney for the United States Trustee.

CROSS-EXAMINATION

BY MR. KENNEY:

Q Good afternoon, Mr. Dooley. Besides your work for Jevic, have you served as a consultant or chief restructuring officer for any other subsidiaries or affiliates of Sun Capital?

A I have.

Q And which ones would those be?

A One other case called—a company called Drysol (ph).

Q Is that the only one?

A It is.

Q Okay. And when were you engaged in that matter?

A Somewhere around late 2008, early 2009.

Q Was that engagement terminated?

A No. It's ongoing.

Q So you have a continuing relationship—do you have any relationship with Sun Capital or is your relationship strictly with the affiliates of Sun?

MR. PACITTI: Objection as to the characterization of relationship, Your Honor.

THE COURT: Overruled. As best he can answer.

THE WITNESS: I know people at Sun Capital. Sun Capital has provided referrals and opportunities in the past. I haven't had a referral from Sun Capital for

four years. Ironically, the Jevic situation was a referral from CIT, not from Sun Capital. But, nevertheless—

BY MR. KENNEY:

Q Did you participate in the negotiations among the debtors, the committee, CIT and Sun for the settlement that is before the Court now?

A Mr. Pacitti and I essentially mediated the settlement. By that I mean, we asked all parties together. We held meetings. We tried to include all parties. We were looking for a global settlement of the case. So, yes, I was actively involved in this.

Q Okay. Did you have discussions with any of the people from Sun directly?

A No.

Q Okay. Who engaged in the discussions with Sun Capital?

A Counsel for Sun, I suspect, their folks at Kirkland & Ellis.

Q Okay. And did you engage in discussions directly with them?

A From time to time I talked to Kirkland & Ellis, yes.

Q Okay. And what about negotiations with CIT? Did you have direct contact with people from CIT?

A Only once, once during one of the mediation meetings we had at Pachulski's office in March of 2012 with all parties present. CIT, I believe, had two representatives at that meeting. Otherwise, all of the conversations have been through counsel.

Q Okay. In any of those discussions that you had—let's start with CIT, the representative from CIT and

CIT's counsel—did any of them ever tell you why the funds that CIT was paying in were specifically earmarked for the payment of administrative expenses?

A No.

Q And are you aware of—at—did they say nothing at all about it?

A It was part of a global settlement to resolve the lawsuit.

Q Do you know who—who was the author of that particular term that the money—the payment from CIT would be specifically earmarked for the payment of administrative expenses?

A I don't think anyone was the author of the term. It was the subject of negotiation between three or four parties.

Q Do you know who first brought up the subject?

A No, I—no, I don't, Mr. Kenney.

Q Okay. Let's turn to the Sun Capital side of it where Sun will release its lien on collateral and allow the paying of proceeds of its collateral to be paid to the general unsecured creditors. Was there any discussion with Sun Capital's counsel or anyone from Sun about why it was being earmarked for general unsecured creditors instead of being paid directly to the estate?

A I'm not sure of Sun's motivation that specifically. So, no. I—I don't have any knowledge of that.

Q The proffer of evidence, I believe, that Mr. Pacitti said that all of the other priority claimants are being paid?

A The question is?

Q Is that your—is that your understanding that all of the other priority claimants except the WARN Act claimants are receiving payments under this settlement?

A I believe so. Yes.

Q Okay. And is that based on the chart that was filed with the supplement?

A And my knowledge of—yes, and my knowledge of the case, I believe.

Q Mr. Dooley, have you ever looked at the claims register in this case?

A I have.

Q Okay. Did you ever look at Claim Number 601 filed by Melvin L. Myers (ph) as a priority claim for $4,025.61?

A I would have to see the claim. Is he part of the WARN class?

Q I'm looking at Mr. Myers' claim, sir, and on the face of the claim it says it is for "unpaid vacation and personal time."

A Uh-huh.

Q Okay. $4,025.61 and it does have attached some earning statements from ADP showing year to date vacation hours earned—accrued.

MR. KENNEY: Your Honor, I don't have any exhibit tabs. May I present this to the court recorder for marking?

THE COURT: Sure. Or you can just mark it as UST-1.

(Mr. Myers' claim marked as UST-1 for identification)

MR. KENNEY: Your Honor, should I give a copy to the recorder?

THE COURT: No. I'll just take it.

MR. KENNEY: May I approach, Your Honor?

THE COURT: Sure.

MR. KENNEY: May I approach the witness?

THE COURT: Absolutely. Thanks.

MR. KENNEY: Thank you.

BY MR. KENNEY:

Q Mr. Dooley, I will represent to you that I looked at the claims register less than an hour before coming to court and this claim was still listed as—did not have any listings of further activity such as the claim having been—had an objection to it granted. I don't know if an objection has been filed.

A There's been no objection filed to the best of my knowledge.

Q Okay. And—

A As—do you know if there was one?

Q I don't know how—how epic marks the docket that they maintain, if they—I believe that they list as soon as objections are filed. I know that—

A That's my understanding as well.

Q —when an order has been entered, the docket does reflect a reduced amount.

And is Mr. Myers listed on the supplement of claims that are being paid—

A No, he is not.

Q —the priority claims?

A Counsel, just so I'm reading this right, is he alleging this claim is for $4,025?

Q That is correct, sir.

A Thank you.

MR. KENNEY: Your Honor, may I approach the bench and the witness again?

THE COURT: Sure. Thanks.

THE WITNESS: Thanks, Mark.

BY MR. KENNEY:

Q Now, Mr. Dooley, what I've just handed you is—is a priority proof of claim on behalf of Jeffrey Ohlers (ph).

MR. KENNEY: I'll note for the record that Mr. Myers and Mr. Ohlers are also members of the WARN class.

THE COURT: Okay.

MR. KENNEY: But these are separate claims apart from—these are, you know, vacation pay. These are not WARN Act claims.

THE COURT: Sure.

BY MR. KENNEY:

Q Now, Mr. Dooley, to your knowledge is Mr. Ohlers listed in the supplement of priority claims who are being paid?

A He's not—not.

Q Okay. And, again, I'll represent to you that when I checked the docket before today's hearing Mr. Ohlers

was listed having a pending claim of—claim number 540 for $3,633.04.

Did you make any comparison of the claims register of priority—of the priority claims listed in the claims register against the supplement that was filed by the debtors today—filed by the debtors as part of their supplement?

A We did.

Q Okay. Is it still your testimony that all of the priority claimants are being paid?

A I would have to verify these two. So you've created some doubt in my mind whether or not there's been these two missed. And I will say that, for whatever it's worth, Counsel, that the debtor paid $900,000 of accrued vacation with the court's leave as well as insurance run off, so I would find these claims to be unlikely to be valid. But I do not know for sure.

Q But no claims—no objections have been filed to—to your knowledge?

A That is correct.

Q Okay.

MR. KENNEY: I have no further questions, Your Honor.

THE COURT: Hang on. I—I want to make sure that I followed the point of this.

What you've identified are claims that appear on the register that are marked, at least under box 5 of Form 10, that they're marked off as a 50784 priority claims for vacation, et cetera, right?

MR. KENNEY: That's correct, Your Honor. These are—remain as allowed priority claims.

THE COURT: And there's no indication anywhere on the record that they've been paid or otherwise objected to or otherwise disposed of, and the witness has testified that to his knowledge they are not included in—in priority claims to be paid under proceeds from the settlement?

MR. KENNEY: That's correct, Your Honor. They—they have not been paid and there is no indication that they will be paid. And, you know, again, in terms of, you know, canvassing the record to make sure this is a reasonable settlement, okay, I only checked two of the claims on the docket. There are hundreds, if not thousands of claims. Okay. And obviously you have a number of objections from taxing authorities, but those are not the sole priority claimants.

THE COURT: Some—okay.

MR. KENNEY: Okay. And I have no further questions of Mr. Dooley.

THE COURT: Very good.

Mr. Loizides.

CROSS-EXAMINATION

BY MR. LOIZIDES:

Q Good afternoon, Mr. Dooley. For the record, Chris Loizides for the WARN claimants.

* * *

Q Do you—can I ask you to identify what has been marked as W—Exhibit W-2?

A It's captioned, second amended complaint and objection to claims filed by committee counsel in this case—in the Jevic Holding Case, et al.

Q All right. If I can take you to the—it's a long—long document. If I can take you to page 77. It is double-sided.

A I'm there.

Q Well, actually, let's—let's talk specifically about Sun, so let's—if we can skip ahead to—paragraph 13 on page 80 and thereafter, if I could direct your attention to that.

A Okay.

Q And does it appear upon reviewing that that the committee is seeking a determination that transfers and conveyances and obligations incurred by the debtors for the benefit of Sun would be essentially unwound or undone as a result of this, if—again, assuming the committee succeeded in its efforts?

MR. PACITTI: Well, let's object, Your Honor.

THE COURT: I'll bet it's the same one. Go on.

UNIDENTIFIED SPEAKER: The document speaks for itself. I—at this point for a legal conclusion of an allegation in a complaint that we're not a party to.

MR. PACITTI: Same objections, Your Honor, plus speculation to the extent that he is asking the witness what success in the litigation might mean and—and he is not a lawyer, so I don't know that he's capable of doing that.

THE COURT: I don't need a response.

I'm going to overrule the objections. I would note that I'm aware that the witness is not a—an attorney and is not testifying for purposes of a legal conclusion. He has testified, though, with respect to the nature of the settlement, the contours of the settlement, where

the settlement came from and at bottom the settlement is, among other things, a settlement of the issues that are raised in this.

And as I understand, the question goes to in the absence of settlement what happens with a win on a particular count. I'll allow him to answer that to the extent he can.

THE WITNESS: I think there's no doubt that the unsecured creditors' committee has asked that—that the loan transaction be totally unwound with all the hosts of—of adverse findings. At least in my experience that's pretty common in litigation. You ask for everything under the sun. Whether or not you get that's a question of fact and—and trial. So, yeah. I guess it is conceivable that there would be all these hosts of uglies (sic) posed upon the lenders. I suspect it's fairly unlikely, but it is possible.

MR. LOIZIDES: Okay.

BY MR. LOIZIDES:

Q Is Sun—is Sun owed anything other than by virtue of its subrogation rights to CIT? And when I say that I would include any adequate protection claims associated with that.

A Sun is—in its role as last out lender in this case. Is that what you mean?

Q Well, they—do they have—do they have—are they owed any other money? I mean, do they—did they loan—is there some other transaction out there, some loan transaction on which the debtors are indebted to someone?

A I think Sun is—as a entity probably has some claims against the estate, which they waived, but Sun

as the lender, no. I've tried to list what I understand to be Sun's claims as a secured lender against the estate, which is the principal amount, which is a subrogated last out for participation, accrued interest, which is unpaid, and attorney's fees that relates to the loan.

Q But just again to be clear. The interest and attorney's fees still relate to that same subrogation claim; is that correct?

A Yes. Of course.

Q Okay. All right.

A Of course.

Q All right. All right. Do you know how the decision—under the proposed settlement the WARN claimants are receiving nothing, correct?

A Under the 9019 that's—that's before the Court today, the WARN claimants are receiving nothing. We've tried—we've tried to involve them in the negotiations and it didn't work.

MR. LOIZIDES: I move to strike the last portion of that testimony about—

THE COURT: Stricken.

MR. LOIZIDES: All right. We'll continue.

BY MR. LOIZIDES:

Q Do you know how the decision was reached not to pay the WARN claimants anything? How did that come about, if you know?

A There was no decision not to pay the WARN claimants. There was a decision to settle certain proceedings amongst parties. The WARN claimants were part of that group of people that decided to create a settle-

ment. So there was no decision not to pay the WARN claimants. There was a decision—

Q But—

A —to settle amongst parties that negotiated.

Q All right. Did you conduct negotiations with each of the beneficiaries of the trust? I guess you—well, withdraw—I withdraw the question.

THE COURT: Okay.

BY MR. LOIZIDES:

Q What—why are the debtors creating a trust for the benefit of general unsecured creditors only?

UNIDENTIFIED SPEAKER: Objection, Your Honor.

MR. PACITTI: Again, this has happened a couple of times. This actually misstates the agreement because under the supplement priority tax claimants are beneficiaries of the trust. As a—

MR. LOIZIDES: I—I apologize, Your Honor. I was thinking of the original settlement.

THE COURT: Okay.

BY MR. LOIZIDES:

Q Why are the—why are the debtors creating a trust for the benefit of certain priority creditors, not WARN claimants, and general unsecured creditors, but not all—

A I think it's—

Q —creditors?

A —the nature of any 9019 settlement. Those parties that have agreed to a settlement have a mechanism for

exchanging funds, consideration, waiver of claims. So that—that's simply all it is. It's simply an exchange by the parties involved where the secured creditors are putting either new cash into—into a pot or leaving substantial claims behind and those claims are going to satisfy administrative claims, priority claims, and a pro rata share of the unsecured creditors.

Q All right. Well—

A I don't think it's any more complicated than that, Counsel. I'm sorry.

Q Do—do you know—let me ask you this. Have you ever been involved in a case—a bankruptcy case that—well, have you ever been involved in any bankruptcy cases other than this one?

A Yeah, a few.

Q Are you aware of what occurs when a case converts to a Chapter 7, in general?

A Sure.

Q Is a Chapter 7 trustee appointed?

A Sure.

Q So if these cases were converted, would a Chapter 7 trustee be appointed?

A I would imagine so. Yes.

Q And would the Chapter 7 trustee, in your understanding, succeed to the claims that were asserted in the committee's adversary proceeding?

A They would succeed any assets the estate had left. Yes. That claim is one of those assets.

Q Okay. And is there anything that would prevent the trustee from retaining counsel on a contingency fee basis, for example?

A Only the practicality of the trustee would come into a case with no assets, with a lawsuit against it by WARN claimants and all the cash would go to the secured creditors because it's their lien. So I don't—you—you would saddle a Chapter 11 trustee with a cost for sure, no assets to fight, and a multi-million dollar piece of litigation that's—you've got to convince people on the cone to fight with you, and then you've got to hire expert witnesses. Who is going to pay for those?

Q Well, let me—let me ask you this question. If the trust—do you have any reason to believe that CIT and Sun would be unwilling to take a virtually identical deal presented by a Chapter 7 trustee?

A You would have to ask them.

Q You don't know?

A You would have to ask them. I don't represent CIT or Sun, so, yes, I do not know.

Q All right. Okay. Do—well, I may have already asked you this, but do you know—do you know whether CIT—whether it was an essential deal point for CIT that Sun get a general release from the estate?

A I don't know, but common logic tells you that only one party cares about themself (sic) and that's the party that gets the benefit of the deal. So I could imagine that CIT could care less what Sun's terms were. They just cared what was in it for CIT, as Sun probably felt the same way for themself (sic). It's human nature, Counsel.

Q Okay. Fair enough.

MR. LOIZIDES: Can you hold on for one second, Your Honor? I'm sorry.

THE COURT: Take your time.

MR. LOIZIDES: No further questions, Your Honor.

THE COURT: Any other cross?

All right. Redirect.

REDIRECT EXAMINATION

BY MR. PACITTI:

Q Mr. Dooley, you testified that on direct, I think, and on—on cross that it was your understanding that the debtors paid all accrued vacation wages to employee pursuant to first day orders entered by the Court; is that your testimony?

A It is.

Q Okay. Can you explain the process under which you and the company undertook to determine the amount of those claims and come up with the number that was requested for approval by this Court?

A Certainly. As part of the negotiation with the secured lender, which at that time was agented by CIT, to create a debtor-in-possession budget or a DIP budget, myself and my team negotiated with the CIT people extensively over a couple of week period of time on a budget. One of the points, probably the most contentious point on that budget negotiation was given the fact that it was likely that we were going to have to quickly wind down operations, how to treat the employees relative to expenses other than accrued payroll.

And it was my position that for a variety of reasons we should—and, frankly, some of these were self-serving from the estate and lenders' point of view pro-

tection of collateral that my belief was that we should make sure we paid all the accrued vacations and we should pay as much as we could of the health benefits. This was a self-insured company, so there was a health insurance run off issue involved.

And we had had some incredibly contentious debates with CIT over this issue of which we prevailed. But we went through, with the help of the HR people of Jevic, all the paper—people's time records and convinced ourselves to a reasonable point that we had the correct vacation amounts with people. And it is possible, as counsel asserts, that there was one missed. It's—it's not outside of the realm of possibility. I find it highly unlikely.

But the point that I would like to make, Counsel, is that the lenders at the request or to some degree a request of debtor, myself, was they paid $900,000 of accrued vacation and $2.1 million of accrued health insurance benefits that I will tell you in many cases are left stranded in wind down 11's like this. $3 million got paid to the employees. So when people tell me that the employees were treated poorly here, frankly, that—I—that is just factually untrue.

MR. PACITTI: Okay.

BY MR. PACITTI:

Q Now as part of the settlement, there's also a claims reconciliation process that will continue if the settlement is approved. isn't that correct?

A It is.

Q Okay. And part of that would be a review of the claims of the nature that are marked as UST-1 and UST-2?

A We would review all claims again to make sure that we had them all right. Yes, sir.

Q Now there are a lot of claims objections that have been filed in this case that you're aware of, right?

A There—there's a number. Yes.

Q Okay. But you're not aware of every single claim number that appears on every single one of those omnibus claims objections?

A Of course not. As counsel pointed out, we're talking thousands.

Q Okay. Can I just draw your attention to UST-1?

A Which one—which one is that, Counsel? These are not—

Q It is—

A Oh, it's on the bottom. I'm sorry.

Q —I believe, Myers. Yeah.

A I see it. Sorry.

Q The third page reflects vacation—this is what Mr. Kenney pointed your attention to—vacation earned and vacation hours. And then below that it has an indication, personal hours left, vacation hours left, zero. Do you see that?

A I do.

Q Is it possible that there truly is just an accounting of what could potentially be earned by this employee, but not actually what has been earned by this employee as reflected on this ADP statement?

A Certainly possible. It's probably likely. Most employees don't quite understand their paystubs very

well. They're not exactly written in employee-friendly language usually.

Q Okay.

MR. PACITTI: May I have one moment, Your Honor?

THE COURT: Yeah.

(Pause)

MR. PACITTI: Nothing further, Your Honor.

THE COURT: Okay.

Any recross?

MR. KENNEY: Thank you.

* * *

MR. FEINSTEIN: For the record, Robert Feinstein, Pachulski, Stang, Ziehl & Jones, counsel to the official creditors' committee.

Your—Your Honor, the committee's lone witness is Edward Gavin who is the managing director and founding partner of Gavin Solmonese. They're in the process of acquiring NHB Advisors, which was the initial entity retained by the committee. So with that, Your Honor, I would like to proceed with a proffer of Mr. Gavin's testimony.

If Mr. Gavin were called to the stand he would testify that he is the managing director and founding partner of Gavin Solmonese, and that the predecessor entity, NHB, was engaged as the financial advisor to the official creditors' committee, appointed in the Jevic Chapter 11 cases, and that he was the principal of NHB;

That as the leader of the firm's corporate restructuring practice he is responsible for the firm's development, selling and oversight of engagements to, among other things, advisory engagements to official creditors' committee, such as Jevic, and that he has led the firm's engagement in Jevic since its inception in June of 2008.

Mr. Gavin would testify as to his educational and professional background. In the interest of time, Your Honor, I will move on since he's here as a fact witness and not as an expert, and that he has served as an advisor to many, many creditors' committees in this and other jurisdictions;

That as advisor to the Jevic creditors' committee, a significant part of his work and his firm's work related to the investigation, development and assertion of claims arising out of the June 2006 leverage buyout of Jevic sponsored by Sun Capital, which was financed with debt from Bank of Montreal that was then refinanced with debt extended by a syndicate led by CIT, and that Mr. Gavin worked closely with the committee's counsel to determine whether the Jevic LBO formed the basis for viable causes of action based on fraudulent transfer and other theories, focusing in particular on the projections utilized by the parties to the transaction at the time of the LBO as well as the subsequent sale leaseback of Jevic's real estate to determine whether those transactions rendered Jevic legally or equitably insolvent undercapitalized or unable to pay its debts as they matured.

Thus, he, in the course of this engagement, he and his firm assessed the fair value of the debtors' assets in comparison to the debtors' total liabilities or the balance sheet test of insolvency. He assessed whether the

debtors were able to pay their obligations as they became due or the ability to pay test of insolvency, and whether the debtors' operations had adequate capital immediately before and after the LBO and the sale leaseback.

He would testify that the committee was granted standing pursuant to the challenge provision in the Court's final DIP financing order to assert any defenses to the secured claims of CIT as well as any affirmative claims, and that he and his firm assisted counsel between the time of the engagement and the end of the year 2008 in investigating such claims and formulating and drafting a complaint that asserted principally that the June 2006 leverage buyout and the subsequent sale leaseback transactions were fraudulent conveyances.

At year-end, he would testify year-end of 2008 the committee filed a complaint asserting such claims against CIT pursuant to their standing granted in the final DIP financing order, and that the factual analysis developed by his firm and included in the complaint were to the effect that Jevic incurred obligations and granted liens to CIT without receiving reasonably equivalent value, and that Jevic was left insolvent under—and undercapitalized.

Mr. Gavin would further testify that after the complaint was filed, CIT filed a motion to dismiss on January 3rd—30th, 2009, and that this Court, on September 15th, 2011, rendered a decision denying the motion to dismiss in substantial part.

He would further testify that in the interim the committee added Sun Capital as a party on the basis that they had received a subordinated lien by virtue of having paid a guarantee, a limited guarantee prepetition.

Mr. Gavin would further testify that in October 2011, following the Court's ruling, the committee filed an amended complaint and that on November 4th both CIT and Sun filed answers to the complaint; further that those answers denied many of the factual allegations in the complaint, including, most importantly, that the debtors were left insolvent. And that in Mr. Gavin's professional experience he would testify that a contested litigation over insolvency is a very protracted and expensive exercise that often turns into a battle of the experts, and that that's—that is what is—what would have ensued here.

He would further testify that CIT engaged the Protivity (sic) firm to render expert testimony on their behalf and that, of course, the two expert opinions were diametrically opposed.

Mr. Gavin would further testify that since last November that the committee pursued a dual path. It prepared for discovery and trial of the case and it also explored settlement options.

With regard for—to trial preparation, Mr. Gavin would testify that he did undertake preparing an expert report to be provided to the defendants with regard to the insolvency and related issues; that this was, in fact, a complex undertaking that required many judgment calls as to which reasonable minds could differ.

Mr. Gavin would further testify that—that CIT's expert was prepared to testify at trial that the Jevic LBO, which occurred in or about June of 2006, was not the cause of the company's failure two years later in 2008, but that intervening events, such as the declining economy and the shrinking demand for the trucking kind of business that Jevic was in were the predicates for the company's failure such that there would be seri-

ous challenges to the committee's claims based on insolvency and causation.

Mr. Gavin would further testify that aside from preparing for trial, that he and the committee explored settlement and—and that this was not the first time that settlement was explored. And, in fact, that there were—before the decision on the motion to dismiss, there were meetings among all the parties, and that would include CIT, Sun, the debtors, the committee and the WARN class action claimants, but that no settlement was reached, and that there were renewed efforts in the past year to bring about a global settlement.

Mr. Gavin would further testify that notwithstanding a statement in the WARN claimants' objection before the Court that the WARN claimants were never asked to participate in the settlement process, that Mr. Gavin attended an all hands meeting of the parties and their counsel in March, March 13th of 2012; that WARN counsel who are in the courtroom were present as were all the other parties in the courtroom and their counsel, and that no settlement could be reached because the WARN claimants essentially were insistent that their claim against Sun—a litigation between two non-debtor parties—had to be resolved as part of a global settlement.

Mr. Gavin would further testify that the committee thereafter made a determination to settle on the terms set forth in the settlement agreement based on the committee's good faith judgment that given the risk and the wards of litigation, including the prospect of waiting for perhaps many years before a litigation against Sun and CIT could be resolved at significant expense for which there is no means of funding in the estate, that obtaining the certainty of a modest distri-

bution to unsecured creditors now is in the committee's—the constituencies' best interest.

Mr. Gavin would further testify as to the considerations that the committee and its advisors took into account in negotiating the settlement agreement and ultimately in agreeing to the terms set forth therein. Mr. Gavin would testify that while the bankruptcy case and the adversary proceeding have been pending for over four years, that nonetheless the litigation is in a very early stage; that there's been a complaint and an answer, but there has been no pretrial discovery under Bankruptcy Rule 20—7026 et seq., and further that significant obstacles were presented to the committee by virtue of the answers and affirmative defenses interposed by Sun, and the answers and affirmative defenses and counterclaims asserted by CIT.

The—Mr. Gavin would further testify that in order to bring this litigation to conclusion, including after all appeals that the process could conceivably take many years in addition to the four years that have transpired since the case began, and further that it would cost millions of dollars aside from the professional fee associated with bringing that litigation in order to press the litigation to trial. And that those expenses, aside from attorney's fees, would include expert costs and disbursements associated with a trial and the inevitable appeals that would ensue insofar as CIT and Sun expressed to the committee during the course of settlement discussions that if the matter didn't settle, that they would vigorously defend the case, and if they lost at trial, they would take the matter up to the highest appellate court available to them.

Mr. Gavin would further testify that putting aside the hurdles to the success in a litigation and the time

delay, that the committee was presented with an alternative of an early settlement that would provide for satisfaction of administrative claims, some priority claims, and a five to ten percent recovery for general unsecured creditors who have already been waiting many years for any recovery in these cases, and that the committee, as advised in conjunction with its advisors, determined that accepting the bird in hand of this settlement was far more beneficial to creditors of this bankruptcy estate than rolling the dice in the hopes of securing a large amount of money many years from now and possibly losing the litigation many years from now if—if that course could be pursued.

Now Mr. Gavin would further testify that there is substantial uncertainty in the further prosecution of the lawsuit because of the financial condition of the estate and because of the inability of the estate to secure trial counsel who would not only take a very complex litigation that would take many years in the face of very well-financed and aggressive adversaries through the trial and appellate process, considering that such counsel would have to advance costs because the estate has no assets with which to pay for anything associated with taking a case of this complexity to trial;

That Mr. Gavin would further testify that among the substantive obstacles to the committee's success in such a litigation, assuming an attorney could be found to bring the case and to fund expenses would be overcoming a—a long litany of affirmative defenses that were interposed in Sun and CIT's answers and also in Sun's counterclaim.

Moreover, Mr. Gavin would testify that even if the committee could prevail on the merits of its causes of action, there is uncertainty as to how damages would

be measured and as to whether or not, under certain outcomes, there would be any benefit to anybody other than administrative creditors insofar as there was a roll up of the bank debt in this case and Sun and CIT have super priority administrative claims such that even if liens were avoided, there would still be an overhang of tens of millions of dollars' claims before any priority or unsecured creditors could see any—any recovery.

Mr. Gavin would also testify that in terms of considering the potential benefits to the estate of continued litigation, aside from CIT's claims which could be reasserted under 502(h) and that they may be $40 million of super priority claims, that there were also substantial unpaid administrative claims in the estate, professional fees of approximately $1.5 million, as Mr. Dooley testified, approximately 300,000 of 503(b)(9) and other priority claims such that in many scenarios where the committee might find a victory on the merits, the outcome would still result in no recovery for non-administrative creditors.

Mr. Gavin would further testify that given the prospect of years of litigation to establish its case and overcome CIT's and Sun's affirmative defenses and CIT's counterclaims, that the committee would face a monumental task and an uphill battle at monumental expense while the estate has no unencumbered assets and is already in the hole for professional fees to date, that—incurred in connection with litigation, that the estate has no visible means to pay for the expenses already incurred, let alone the substantial disbursements that would have to be funded to prosecute the case going forward.

Mr. Gavin would testify that from the committee's perspective the only alternative to—Mr. Gavin would

further testify that if the objectors had their way and the case were converted to Chapter 7, that the—a Chapter 7 trustee presiding over the estate with no cash and over a million dollars in unpaid administrative claims would be left to his own devices to advance the litigation, and that based on his knowledge of the case and the financial condition of the estate that conversion would decimate any value associated with this litigation that the committee has been able to generate for the estate for administrative claims for certain priority claimants for unsecured creditors, and that it is at best highly speculative that a Chapter 7 trustee could secure counsel who would bring this kind of litigation and advance costs and secure a victory, including after all—including after appeals many years from now that could produce as—as good or better a result than is presented to creditors and to the estate under the settlement agreement.

Mr. Gavin would testify that in light of all of these factors, the—that the creditors will have more certainty of recovery and will enjoy a recovery in the near term, after having waited for over four years without any payment on their claims, and that the risk associated with an uphill litigation battle that could take years to pursue support the decision made by the committee to settle on the terms set forth in the settlement agreement.

Mr. Gavin would further testify that the settlement agreement was heavily negotiated by the parties in good faith and provides an advantageous outcome for the vast majority of creditors in the case, and that in his view, based on his knowledge of the case and his experience in bankruptcy cases generally that no better result could have been obtained, and further that neither Sun nor CIT would pay anymore to settle the case

than they expressed and is set forth in the settlement agreement.

Mr. Gavin would further testify that particularly with respect to Sun, given that Sun is not getting a complete release, but remains exposed to direct claims from the WARN claimants that it was unsurprising to him that Sun was not prepared to do any more than what they are doing under the settlement agreement, which is to assign their collateral of approximately $1.7 million and to relinquish any and all claims to that money as well as any other claims against the estate to bring about a settlement.

Finally, Mr. Gavin would testify that CIT's willingness to pay more in the context of the settlement was tested and that CIT held steadfast that they were not willing to pay anymore to the settlement as they would otherwise devote the same funds to litigating the case through all appeals rather than to pay anymore to resolve the litigation.

I believe that concludes the proffer, Your Honor.

THE COURT: Okay. We'll take a five-minute break and then we'll reconvene for cross, okay? Thanks.

Stand in recess. Thanks.

(Recess taken at 3:06 p.m.)

(Proceedings resume at 3:21 p.m.)

THE COURT: Please be seated.

Mr. Gavin, I think you're up. All right. We'll swear the witness, please.

Please remain standing.

THE CLERK: Would you please raise your right hand?

(Witness sworn)

THE CLERK: Please state your name and spell it for the record.

THE WITNESS: Edward T. Gavin, G-A-V-I-N.

THE CLERK: Thank you.

* * *

CROSS-EXAMINATION

BY MR. KENNEY:

* * *

Q Now I want to make sure I understood your—your—the proffer; that basically since, is it approximately November of last year, the committee was preparing for trial while simultaneously also prepare—pursuing settlement?

A I don't know when the discussions of settlement first started-, but I believe it was after preparation of at least the committee's expert report which was delivered to CIT, and probably during the preparation of CIT's expert report which the committee got in late February or early March.

So while—while those two things happened within the same space of time, one certainly happened for much longer. The preparation for litigation happened, in terms of creating—creation of the expert report started earlier than the discussions of settlement, at least in the current iteration of the discussions of settlement. There had been discussions of settlement before that had not gone anywhere.

Q Okay. Did you personally participate in any of the neg with Sun and CIT?

A I don't know if what I participated in would be characterized as negotiations. I did participate in the meeting in March at Pachulski's office in New York that ultimately led to this proposed settlement.

Q Did you provide any—did you have any discussions with members of the committee regarding the settlement or the terms of the settlement?

MR. PACITTI: Objection, Your Honor. I'm just going to raise the attorney/client privilege at this point and if there were communications to which counsel was privy, that they would be protected by the privilege.

MR. KENNEY: And, Your Honor, Mr. Gavin's not an attorney. He's a financial advisor. There is no federal accountant privilege, which is probably the closest thing you're going to find for financial advisor.

THE COURT: Let me ask you, if the committee and the debtor are meeting with the financial advisor there and the committee members are communicating with their counsel for purposes of developing a strategy, would you take the position that the presence of the court-appointed and retained financial advisor is an outside agent to disrupt or otherwise impair the privilege?

MR. KENNEY: I don't think I would go that far, Your Honor, but I'm not sure that that's been put on the table. And if a privilege is being asserted, what's the basis of it? You know, were the only meetings—were his only contacts with members of the committee through the agency of counsel?

THE COURT: Fair point. I don't think I need to answer now whether or not there's a financial advisor or—or whether there's a heightened—I don't think

there's a recognized federal privilege for financial advisors in that capacity, but why don't you do me a favor, ask the question again.

MR. KENNEY: Okay.

BY MR. KENNEY:

Q Did you have any discussions with members of the committee about the proposed settlement of the adversary proceeding?

A I'm sure I was involved in discussions with the committee as a whole along with counsel regarding—regarding the proposed settlement.

Q Did you have any discussions that counsel was not a part of?

A Not to my knowledge.

MR. KENNEY: If I can just have one second, Your Honor.

THE COURT: Sure. Take your time.

MR. KENNEY: Do this without getting an objection to it.

BY MR. KENNEY:

Q You were in the courtroom when Mr. Dooley testified—

A Yes, I was.

Q —earlier today? And do you remember Mr.—someone, I think it was Mr. Loizides had asked about Sun's motivation—CIT's motivation and Mr. Dooley said, well, he thinks people act for themselves?

A I do recall that exchange. Yes.

Q Are you aware of any discussions between debtors and—the debtors or—between the committee and CIT and Sun specifically discussing how the fund—the various buckets of funds in the settlement would be allocated?

A I am not aware of any discussions. If there were such discussions, I wasn't a party to them.

Q Whose idea was it for the Sun collateral to be transferred to a trust for the benefit of the general unsecured creditors?

A I don't know.

Q Did you ever hear anything from anybody on behalf of Sun that led you to believe that Sun would care where that money went as long as Sun got its release?

A No. I—I never had—I never heard anything from Sun. I—this may make it easier for you. I never had any communications directly with Sun period.

Q And you were never involved in any—any of the discussions—or you said that you were—participated in a meeting, so that meeting was just with committee counsel or other counsel?

A The March meeting that I think you're referring to was myself and—and Mr. Feinstein and Mr. Groskahl (ph) for the committee, CIT's counsel, Mr. Stempel and Sun's counsel, Mr. Pacitti, Mr. Dooley and the counsel presently in the courtroom today for the WARN Act plaintiffs. So everybody was there.

Now I will tell you that as the day went on and it looked like at least the notion of a settlement was reached, I left simply because I had to be some—I had to be in Washington, D.C. that night and it was a long

train ride from New York to Washington, D.C. So Mr. Feinstein and Mr. Groskahl stayed on long after I left.

Q Do you know whether there were any discussions of entering into separate settlements with CIT and Sun?

A I don't know if there were.

Q Your proffer indicated that there wouldn't be anything for a trustee to do if the case were converted to a Chapter 7?

A Well, I think my proffer indicated that if the case were—were converted to a Chapter 7, absent meeting a number of very difficult hurdles to meet, there would be no assets for a trustee to pursue this litigation. There would be no means by which to pay costs and expenses going forward in the litigation. There are no assets to administer since they're all covered by liens by creditors. So it—it's highly speculative that a trustee would find contingency via counsel who would also be willing to write checks out of pocket to fund expert's fees, expert's costs, court costs and the general costs of litigation all while sitting behind secured creditors who have liens on all of the assets in the estate.

Q Okay. If a settlement were completed with Sun and CIT with the same economic terms from their perspective, and all of the money remained in the estate rather than being distributed to administrative claimants and general unsecured creditors as provided in the settlement agreement, would a Chapter 7 trustee be able to administer those funds?

A So just so I understand what you're asking, if Sun and CIT reached the settlement, the funds went into the estate, would a party responsible for the estate, be it a debtor-in-possession or a Chapter 7 trustee be able

to simply continue on and administer the estate with—with those funds being in the estate? That's what you're asking?

Q Well, I asked specifically about a Chapter 7 trustee.

A Okay. I—I imagine so, although I imagine it would also come at—at cost to the estate compared to where we are today.

Q Have you ever represented or worked with a Chapter 7 trustee, Mr. Gavin?

A We are engaged by a few Chapter 7 trustees now. Yes.

Q Okay. And have you ever worked with a trustee, a Chapter 7 trustee in assessing—in determining how funds—funds in the estate are distributed?

A I believe so. Yes.

Q Okay. And are you aware that the trustee is required to distribute them in accordance with the priorities set forth in the Bankruptcy Code?

A I am aware that the priorities apply to a Chapter 7 trustee. I'm also unfortunately aware that that—there's rarely, in Chapter 7 cases, funds available after the Chapter 7 trustee's fees and costs and expenses of the administration of the Chapter 7 portion of the estate.

Q Okay. And is that because the Chapter 7 trustee is incurring those expenses and fees and costs for the purpose of gathering assets, pursuing claims, litigating claim objections and the like?

A Yes. I mean, administering a Chapter 7 estate costs money.

Q Hasn't a lot of that administrative cost already been incurred in this case?

A I would assume that the claimants—the claims issues that—that you and Mr. Dooley were discussing earlier, absent those questions that the estate has been marginally administered, the only thing that's left is the litigation.

Q So that if the litigation settled on terms that were satisfactory to CIT and Sun, the trustee could then administer those funds; is that correct?

A Presumably.

Q Pardon me.

A Presumably.

Q Okay. Thank you.

MR. KENNEY: No further questions, Your Honor.

Thank you, Mr. Gavin.

* * *

MR. STEMPEL: The—a few points, Your Honor, and I'll try to make it quick.

First, to the extent there's been any argument or testimony that's confused Sun's claims and liens, they result from $2 million of funding. They don't just arise—when somebody says subrogation, it means we put in $2 million. That's how we got subrogated. So they're walking away from a $2 million plus claim.

Second, to the extent there's any confusion about when the release that Sun gets happens in connection with when the collateral or lien transfer occurs, they're contemporaneous like any other settlement that you securities.

Second (sic) point that I have to address is—relates a lot to Mr. Kenney's speculation that there's no reason

why Sun or CIT wouldn't do this deal with a Chapter 7 trustee or—or maybe more importantly, care where the money goes. Well, it's not—it doesn't take testimony for Your Honor to—to figure out, Sun probably does care where the money goes because you can take judicial notice that there's a pending WARN action against Sun by the WARN plaintiffs. And if the money goes to the WARN plaintiffs, then you're funding somebody who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis.

In that sense, the settlement is quite unremarkable. Your Honor, I know you throughout your entire bankruptcy life have watched secured lenders who might have challenged—who might be open to investigation and challenged by creditors, cut deals with them, and as part of it I—I would venture to say you've never seen those lenders cut a deal that gives a sharing of their collateral to the very creditor who's still got the right to sue them. That's what we're doing here. So you don't need testimony to know that Sun does care where this money goes.

And the third—another point, Your Honor, is everybody seems to be—the objecting parties seem to be losing the vantage point that this is a package deal. There isn't a separate CIT settlement and a separate Sun settlement, and although I'm not in the habit of—of backing Mr. Feinstein who challenges the Sun Capitals of the world from time to time, the reality is it's a package deal.

Sun and CIT were in the room. It was—it was a collective dollar figure that needed to be freed up by virtue of the unfortunate circumstance of lots of admin claims and liens covering very last dollar. And the collective deal was—Mr. Feinstein successfully got CIT to

reluctantly say I can get you 2 million. They agreed to that. Sun reluctantly agreed, notwithstanding the aggressive theory, he would call it, on damages above the $2 million. And Mr. Feinstein's complaint asserts reluctantly walked away from the full amount of the dollars that were in the estate.

The details of where you're earmarking the dollars to go loses sight of the fact that the estate is benefiting by this collective settlement. It's paying lots of admin claims. It's paying some other creditors. But it is not paying, in part because Sun wouldn't let its collateral be used to pay the very plaintiffs who are suing Sun to pay that specific party who didn't join in the settlement on a basis that was the—where the parties were willing to cut them in in this package deal.

The last point, Your Honor, is really the flood gates argument. I have a little bit different take on the flood gates here. And that is because of the facts—these are not the facts that you get presented with all the time in these structured dismissal type matters, which I agree with Mr. Pacitti and Mr. Feinstein on.

The dismissal was really a—a convenience for us to get it done and solve the case efficiently. It very well could have followed the settlement, but we thought to solve a four-year case collectively, the efficient way to keep down dollar—costs and dollars was to serve it all out on the same time and bake it into the settlement.

But—but the flood gates are not opening here, Your Honor, because, one, you've got testimony that supports the reasonableness of the settlement to solve your 9019 requirements.

Two, you've got unrefutted testimony that here's a case, as you noted at the very outset, that there's really

only two alternatives left. There isn't a third. It's dismissal or conversion, and the unrefutted testimony says dismissal is better than conversion. It just—it gets more money to the admin creditors and gives some recovery to some additional creditors. In the 7 I can tell you we will not duplicate this settlement because Sun I cannot foresee the fact pattern where they agree to hand money over to a party who is suing them out of their collateral voluntarily. It's not duplicated in that Chapter 7 case.

And—and so you've got the testimony that says of the two alternatives this one is in the best interest of the creditors. That doesn't open up the flood gates. You've got—you've got standard—two different standards satisfied and the end of a four-year case in an efficient fashion that—that counsel has worked hard to get done. I can echo that—that they have tried hard to get us all to the table to settle.

* * *